IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1318

WESTERN UNION INTERNATIONAL, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, RCA GLOBAL COMMUNICATIONS, INC., ITT WORLD COMMUNICATIONS, INC. and TRT TELECOMMUNICATIONS CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Western Union International, Inc. ("WUI"), respectfully prays that a writ of certiorari issue to review the judgment and opinion herein of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the Court of Appeals is not yet reported. It is reprinted *infra* at Appendix F. That opinion denied petitions to review and reverse two orders of the Federal

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* RCA Global Communications, Inc., ITT World Communications, Inc., and TRT Telecommunications Corporation are listed as respondents pursuant to the mandate of Rule 21(4) of the Rules of the Supreme Court.

Communications Commission ("FCC" or "Commission") in Docket No. 20452 (*Interconnection Facilities Provided To The International Record Carriers*). The FCC's Memorandum Opinion and Order, released May 7, 1975, initiating said Docket (the "Initial Order"), is reported at 52 F.C.C.2d 1014 and is reprinted *infra* at Appendix B.[1] The Commission's Final Decision and Order, released March 23, 1977 (the "Decision"), is reported at 63 F.C.C. 2d 761 and is reprinted *infra* at Appendix C. The Commission's Memorandum Opinion and Order, released on October 25, 1977, in response to petitions for reconsideration of the Decision and for rejection or suspension of proposed Tariffs Nos. 4 and 266, revised, issued by the American Telephone and Telegraph Company ("AT&T") and certain of its affiliated Bell System Operating Companies (the "Opinion on Reconsideration"), is not yet reported; it is reprinted *infra* at Appendix D. A further FCC order, revising part of the Opinion on Reconsideration, released on December 7, 1977, is not yet reported; it is reprinted *infra* at Appendix E.[2]

Jurisdiction

The judgment of the Court of Appeals was entered on December 21, 1977. This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. §§ 1254(1) and 2350(a).

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[1] The Initial Order grew out of and was based on a June 6, 1974 letter from the Chief of the FCC's Common Carrier Bureau to the American Telephone and Telegraph Company. That letter is reprinted *infra* at Appendix A.

[2] Although this order was released after oral argument in the circuit court, an initial draft of the order was annexed to the FCC's answering brief to that court and was relied upon in the opinion below. (Slip Opinion at 792, Appendix F at 87a.) Appendix E contains both the initial draft and the final version of the order.

Questions Presented

1. Did the FCC unlawfully prescribe rates within the meaning of Section 205(a) of the Communications Act (47 U.S.C. § 205(a)) when it ordered AT&T to file new tariffs, knowing that the carrier could not comply with the requirements of FCC Rule 61.38 that cost data in support of such new tariffs be filed, and made clear that it would waive the requirements of that Rule only if the carrier filed tariffs equalizing certain specified rates at the highest existing level?

2. Can the FCC compel the elimination of a rate differential on a record that demonstrates only that a rate difference exists for two communication services and that expressly leaves open the question whether the rate differential can be cost justified; or must a finding of unjust discrimination in violation of Section 202(a) of the Communications Act (47 U.S.C. § 202(a)) be based upon a record containing at least *prima facie* support for the conclusion that no technological, economic or other relevant differences exist between the services that could justify the rate difference?

Statutes Involved

This petition involves Subchapter II of the Communications Act of 1934, 47 U.S.C. §§ 201 *et seq.*, particularly Sections 202 and 205, 47 U.S.C. §§ 202 and 205, and Section 61.38 of the Rules of the FCC, 47 C.F.R. § 61.38. The relevant statutes and rule are reproduced *infra* at Appendix H.

Statement of the Case

1. Background Facts.

This case concerns the relationship between the rates AT&T charges for essential facilities it supplies to the in-

ternational record carriers ("IRCs") and the rates AT&T charges a group of specialized common carriers which use microwave and satellite facilities to compete domestically with AT&T (the "domestic carriers").

The IRCs provide all forms of record communication services between the continental United States and overseas points. They transmit and receive telecommunications via international submarine cables and leased circuits on international satellites. The IRCs and AT&T are joint owners and users of many remotely located cable and satellite earth stations[3] that are the United States termini of the international cable and satellite circuits. The IRCs' sole access from their operating centers to their satellite and cable stations, and between and among their operating centers in five "gateway" cities,[4] is supplied by specially constructed facilities owned by AT&T. For some thirty years prior to 1978, AT&T supplied these interconnection facilities to the IRCs pursuant to contracts,[5] as specifically authorized by 47 U.S.C. § 211.

AT&T also supplies certain interconnection facilities to its recently formed domestic competitors. These facilities are leased by the domestic carriers to link their operating centers with their individually owned microwave and satellite stations and with their customers. None of these facilities interconnect with any of the United States ter-

[3] The earth stations are located at Andover, Maine; Etam, West Virginia; Jamesburg, California; and Brewster, Washington. The cable stations are located at such places as Green Hill, Rhode Island and Tuckerton, New Jersey (for transatlantic service); Point Arena and San Luis Obispo, California (for transpacific service) and at a variety of locations in Florida (for transcaribbean service).

[4] New York City; Washington, D.C.; Miami; New Orleans and San Francisco.

[5] The most recent of such contracts betwen AT&T and the IRCs were agreed to and filed with the FCC in 1968. All of the AT&T-IRC contracts are substantially identical.

mini of the international cable and satellite circuits. The domestic carriers do not compete with the IRCs, and they have never complained about the AT&T-IRC contracts.

In order to protect the domestic carriers from possible harassment by their primary competitor, AT&T, the FCC required that AT&T provide services to them only pursuant to published tariffs.[6] The tariff rates now in effect were arrived at in 1975 by mutual agreement and compromise, and were "accepted" by the FCC because they effected a rate decrease for the domestic carriers.[7] These rates have never been found by the FCC to be just and reasonable (47 U.S.C. §§ 201(b), 202(a) and 47 C.F.R. § 61.38), because AT&T has been unable to compile and submit the necessary cost data to justify the rates.[8] The FCC has indicated, however, that it will investigate the reasonableness of these rates[9] after cost data becomes available in December 1978.[10]

The tariff rates applicable to the domestic carriers for circuits of the length used by the IRCs are substantially higher than the rates provided for in the AT&T-IRC contracts. It is estimated that application of the higher domestic carrier tariff rates to the IRCs will double their payments to AT&T for interconnection facilities. (In petitioner's case it is estimated that the added costs will amount to approximately one million dollars per annum.)

[6] *See Bell System Tariff Offerings*, 46 F.C.C.2d 413, 438, *enforced sub nom. Bell Telephone Co.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied sub nom. American Telephone & Telegraph Co.* v. *FCC*, 422 U.S. 1026 (1975).

[7] *See Offer of Facilities for Use by Other Common Carriers*, 52 F.C.C.2d 727 (1975).

[8] *See id* at 737.

[9] *See id* at 734, 736; also Opinion on Reconsideration, ¶ 40, Appendix D at 61a-62a.

[10] *See* Opinion on Reconsideration, ¶ 40, Appendix D at 62a.

2. Proceedings Below

On June 6, 1974, the Chief of the FCC Common Carrier Bureau wrote to AT&T on behalf of the Commission, demanding that AT&T terminate its contracts with the IRCs for interconnection facilities and, instead, file appropriate tariffs. (*See* Appendix A.) The demand was rejected. Thereafter on May 7, 1975, the same day that the FCC accepted the compromise agreement concerning the tariff rates for the interconnection facilities leased by the domestic carriers, it initiated Docket No. 20452 by releasing its Initial Order. (52 F.C.C. 2d 1014, Appendix B at 3a.)

Petitioner WUI was one of the four IRCs[11] who participated in that proceeding as designated respondents. The IRCs and AT&T filed comments which pointed out the differences between the interconnection facilities used by the IRCs and the domestic carriers and demanded an evidentiary hearing to explore the significance of those differences. Without holding evidentiary hearings, the Commission, in March 1977, released its Decision, holding that the AT&T-IRC contracts and their rates for interconnection facilities were discriminatory. The Decision directed AT&T to file tariffs eliminating the differences in the way in which the two classes of customers were treated unless those differences could be justified. AT&T was given "discretion" to file whatever rates it chose, but the FCC made clear that any difference in rates between the domestic carriers and IRCs would have to be cost justified, whereas no cost justification would be required if the rates were equalized. (63 F.C.C.2d at 767 and n.8, Appendix C at 11a.)

On the day after its release of the Decision, the FCC and AT&T conducted the first of a series of four *ex parte* meetings. The last of these meetings was held on May 20, 1977, about a month after WUI had filed its petition for reconsideration.[12] (The existence and general content of these meetings was only disclosed in response to petitioner's request under the Freedom of Information Act. Opinion on Reconsideration, ¶ 30 n.23, Appendix D at 50a.) It is undisputed that the FCC counseled AT&T concerning which IRC interconnection facilities should be priced under tariffs and which should remain subject to the pre-existing AT&T-IRC contracts.

Thereafter AT&T gave the IRCs notice of termination of the contracts and filed proposed tariffs which applied the rates in the domestic-carrier tariffs to the IRCs. The IRCs filed petitions for reconsideration of the Decision and for rejection or suspension of the proposed tariffs. The petitions fully described the technical and other differences between the facilities used by the domestic carriers and the IRCs and stressed the fact that cost differences in providing the two forms of service justified the different rates. Evidentiary hearings were sought to allow for development of the facts exclusively in the possession of AT&T concerning the nature and cost of its interconnection services.

In its Opinion on Reconsideration the FCC refused to hold evidentiary hearings, reaffirmed its Decision and refused to reject or suspend the new tariffs, promising however to investigate the subject of cost justification in a future proceeding to be commenced after AT&T files cost data. (Opinion on Reconsideration, ¶ 40, Appendix D at 61a.) There was, however, one significant change in the FCC's position. In its Decision the FCC

[11] The others were RCA Global Communications, Inc., ITT World Communications, Inc. and TRT Telecommunications Corporation.

[12] By virtue of its Initial Order, this proceeding was classified as "restricted rule-making" (52 F.C.C.2d at 1015, Appendix B at 4a) and was subject to the prohibitions contained in the FCC's *ex parte* rules, which applied until such time as the Decision was no longer subject to reconsideration by the FCC or review by any court (47 C.F.R. § 1.1207).

recognized that cost differences would justify rate differences; but in the Opinion on Reconsideration the FCC held that the IRC rates must be identical to the domestic carrier rates and that it would no longer consider evidence that cost or other differences existed to justify a difference in rates. That question was foreclosed. (Opinion on Reconsideration, ¶ 42 n.33, Appendix D at 65a.)[13]

WUI, RCA Global Communications, Inc. and ITT World Communications, Inc. each petitioned the United States Court of Appeals for the Second Circuit to review and reverse the FCC Decision and Opinion on Reconsideration. By a decision filed December 21, 1977, the Second Circuit denied all three petitions, and by an order dated December 29 declined to stay the effective date of the new tariffs. While Mr. Justice Marshall granted a temporary stay on December 30, 1977, the full Court, on January 9, 1978, denied petitioner's application for a stay and vacated the temporary stay.[14] Thus the new tariff rates became effective January 10, 1978.

Analysis of the Decisions Below

As is evident from a review of the FCC's various utterances herein, the Commission began this proceeding by assuming its conclusion. Since the IRCs' interconnection facilities were regarded as "essentially identical" (63 F.C.C.2d at 765, Appendix C at 9a)[15] to the interconnection

[13] In an Order released on December 7, 1977 in Docket No. 21499, *Offer of Facilities for Use by Other Common Carriers,* the FCC retracted the foregoing prohibition and reopened the subject of rate differentials. (*Id.*, ¶ 2 and n. 1, Appendix E at 72a.) *See infra* n. 19.

[14] Copies of the various orders granting and denying the motions to stay are reproduced *infra* at Appendix G.

[15] In the Opinion on Reconsideration, after the IRCs had pointed out the various technological differences between the facilities, the FCC changed this characterization to "functionally similar". (*Id.*, ¶ 2, Appendix D at 16a.)

facilities used by the domestic carriers,[16] the Commission assumed that they were "like communication services" (47 U.S.C. § 202(a)) and that the rate differences charged by AT&T were unlawful. (63 F.C.C.2d at 765, Appendix C at 9a.) The FCC's holding of unlawful discrimination was based, therefore, on nothing more than its finding that like services were charged different rates. However, the statute only proscribes "unjust or unreasonable discrimination" (47 U.S.C. § 202(a)), *i.e., unjustified differences* in rates for like services.

While the Commission required that the IRCs justify the lawfulness of existing rates, it refused to compile a record on the subject. It is not surprising, therefore, that, through no fault of petitioner, the record is devoid of evidence on the question of whether the rate differential was discriminatory. The Decision does not even discuss the matter, focusing only on the fact that the rates charged the two kinds of carriers were different. Thus, difference alone was equated with unlawful discrimination.

The Decision ordered AT&T to eliminate the unlawful discrimination. While the Decision appears to give AT&T a free hand in choosing a method for remedying the perceived evil, in fact no such choice was left open. The Commission provided that if the new IRC rates "vary from those included in tariffs offering similar facilities to . . . [the domestic carriers] we expect such differences to be fully justified with Section 61.38 [cost-justification] and other data." (63 F.C.C.2d at 767 n.8, Appendix C at 11a.) Only in the face of equal rates would the Commission "waive the Section 61.38 requirement until such time as AT&T files full justification for the various" domestic carrier tariffs. (*Id.*) Thus the rates had to be equalized because it was acknowledged that AT&T could not file Section 61.38 cost data at that time. (*Id.*) Further-

[16] That is to say, both were voice-grade facilities which connected carrier operating centers to other carrier facilities.

more, that equalization had to be at the higher domestic carrier rates (rather than at the lower IRC rates or at some intermediate level) because in the 1975 Order accepting and approving the compromise rates for the domestic carriers the Commission had forbidden any change in the rates charged those carriers without the filing of Section 61.38 cost data. *Offer Of Facilities For Use By Other Common Carriers, supra* at 734-35. As such, even though the Commission did not in so many words prescribe higher interim rates for the IRCs, its Decision had precisely that effect. Furthermore, the FCC admittedly did not comply with the mandate of 47 U.S.C. § 205(a) that prescribed rates be found to be "just and reasonable".

In its Opinion on Reconsideration the Commission admitted that it began the proceedings herein with a "presumption of unlawful discrimination" which AT&T and the IRCs were required "to rebut." (Opinion on Reconsideration, ¶ 2, Appendix D at 17a.) The presumption arose from the Commission's reading of the AT&T-IRC contracts and the AT&T tariffs for the domestic carriers. Said reading, without more, is said to have proved a *prima facie* case of unjustified discrimination. (*Id.*)

The Opinion on Reconsideration makes it clear that the IRCs advanced a variety of differences[17] for the purpose of rebutting the presumption of unlawful discrimination. Indeed the FCC even conceded that certain of the technological differences asserted by the IRCs in fact existed. (*Id.* at ¶ 14, Appendix D at 33a.) Yet, without holding an evidentiary hearing to develop a factual record concerning the differences, the Commission brushed them all aside as either insufficient on their face (*id.* at ¶¶ 13, 14, 38 n.28, Appendix D at 31a, 32a, 59a) or problems for AT&T to address in the new tariffs applicable to the IRCs (*id.* at

[17] Costs, technological, geographic, international versus domestic nature of the services, lack of competition between the IRCs and the domestic carriers and historic practice.

¶¶ 18, 38, Appendix D at 46a, 59a), holding that "functional similarity" alone rendered the rate difference unlawfully discriminatory. (*Id.* at ¶¶ 12-15, 38, Appendix D at 30a-37a, 59a.)

Even though the Commission recognized the significance of cost differentials and agreed that such differences could save the rate differences,[18] and while it further recognized that it would have no idea whether the contract rates were unjust or unreasonable in relation to AT&T's costs until at least December 1978 (Opinion on Reconsideration, ¶ 40, Appendix D at 61a), the FCC nonetheless declared that unexplored issue to be foreclosed and rested the Opinion on Reconsideration on nothing more than its "concern" that the differences reflected "potential" unlawful discrimination. (*Id.* at ¶ 15, Appendix D at 36a.) As such, the agency proclaimed its view that so long as it can discern a potentially unjust or unreasonable rate, it may order its elimination and prescribe a new interim rate (even though it has never found such interim rate to be just and reasonable).

Rather than determine whether the FCC's approach was appropriate under the statutory standard (47 U.S.C. § 202 (a)), the circuit court only considered "whether the FCC's finding of 'likeness' with regard to the domestic and IRC facilities [was] supported by substantial evidence." (Slip opinion at 790, Appendix F at 85a.) The real issue before the court was whether the record contained substantial evidence to support the conclusion that no differences existed between the services that would justify any rate difference. Applying the wrong legal test, the court simply looked through the record for any respect in which the services were "like". The court of appeals was apparently

[18] *See* Letter of June 24, 1977, from the FCC Common Carrier Bureau to WUI included in the record below. *See also Dataphone Digital Service Between Five Cities*, 62 F.C.C.2d 774, 797 (1977).

unaware of the fact that a finding of general likeness speaks not at all to the ultimate question of whether a disparity in rates is nonetheless justifiable under Section 202 (a) because of cost differences or because of different service classifications.

The IRCs' argument concerning cost justification was disposed of in three different ways. First, the court of appeals denied the issue was raised before the FCC. That is simply wrong. (See the extensive discussion of that subject in the Commission's Opinion on Reconsideration, ¶¶ 27, 29, 31, 40, Appendix D at 47a, 49a, 51a, 61a.) Second, the court expressed its view that there were in fact no cost differences. This speculation should be ignored. No evidence was presented to the Commission on this subject —indeed, AT&T will not have cost data available until December 1978 at the earliest—and the FCC itself did not come to that factual conclusion. Finally, the court pointed out that the FCC had promised to investigate this subject in the future,[19] and, if the new rates prove to be too high,

[19] From the outset the FCC noted that it intended to investigate the reasonableness of AT&T's rates for interconnection facilities as soon as cost data was available. (*See Offer of Facilities for Use by Other Common Carriers, supra* at 734-35; Decision, 63 F.C.C.2d at 767 n. 8, Appendix C at 11a; Opinion on Reconsideration, ¶ 40, Appendix D at 61a.) In the Opinion on Reconsideration it ruled, however, that while in that proceeding the IRCs would be entitled to challenge the reasonableness of the AT&T rates as applied to all carriers, they would not be permitted to seek to establish that a rate differential between them and the domestic carriers was cost justified. (*Id.*, ¶ 42 n. 33, Appendix D at 65a.) In effect, without finding what the just or reasonable rates to be charged the IRCs were, the FCC had ordered AT&T to pool its costs for the domestic and international carriers and, thereby, arrive at rates which, though they might be excessively high for the IRCs, would be appropriate for the IRCs and the domestic carriers on the average. Then, in a significant about-face, in an order published via an attachment to the FCC's answering brief filed with the court of appeals (*see*

(footnote continued on following page)

the IRCs can "recover overcharges plus interest. 47 U.S.C. § 208-09." (Slip Opinion at 792, Appendix F at 87a.)[20] The court of appeals failed to recognize that the Commission's promise to hold hearings on the question of cost differences constituted a clear admission that the agency had no real idea whether in fact the IRC and domestic carrier rates should be equal. The court also ignored the essential vice in the FCC's approach, *viz.*, it bypasses the Section 202(a) statutory mandate that the agency find a rate difference to be unjust and unreasonable *before* ordering its elimination.

The court of appeals evinced no interest in the question of whether the Commission violated Section 205(a) of the Communications Act (47 U.S.C. § 205(a)) by prescribing an interim rate.

Reasons for Granting the Writ

I. Introduction

This case concerns the power of the FCC, and every other agency that operates under a statutory scheme similar to the Communications Act,[21] to interfere with carrier-made rates and to prescribe new, increased rates to the detriment of customers of common carriers who annually pay billions of dollars in rates. The FCC here ordered AT&T to equalize the rates it charges for two telecom-

(footnote continued from preceding page)

December 1977 Order, ¶ 2 n. 1, Appendix E at 72a), the Commission retracted that portion of its Opinion on Reconsideration which precluded the IRCs from pursuing in subsequent proceedings the subject of cost justification for their rates vis-a-vis those of the domestic carriers in order to support a rate differential. Thus, this subject remains open.

[20] *See infra* n. 23.

[21] For example, the Federal Power Act, the Federal Aviation Act, the Natural Gas Act, the Interstate Commerce Act and the Packers and Stockyards Act. *See infra* n. 29.

munication services, and it ordered equalization under circumstances and in such a manner as to give the carrier no choice but to increase certain of its rates. Under well-established law, the FCC could have issued such an order only if it found that (i) the existing rate differential was in fact unjustified by any cost or other differences between the services (47 U.S.C. § 202(a)) and (ii) the higher rate which AT&T was compelled to charge was just and reasonable (47 U.S.C. § 205(a)).

The FCC, however, deliberately avoided making either requisite finding. In essence, the FCC contends that no such findings are necessary; that it can interfere with carrier-made rates whenever it finds them suspicious; and that it can coerce carriers to modify suspect rates in particular ways, even though the FCC lacks information concerning the reasonableness of its action, because the FCC may thereby be remedying a rate discrimination.

The FCC's actions herein are supported only by its good intentions. But decisions in the field of rate making have too great an impact upon the national economy, the carriers and the public to be made upon mere agency suspicion, intuition and/or good intention. The FCC admittedly had no basis for concluding that the existing rate differential was unjustified, that the rates should be equal or that the highest existing rates were just and reasonable. An agency has no warrant to upset existing rate structures unless they have been found to be actually unlawful, and has no right to compel rate increases unless those higher rates have been determined to be just and reasonable.

When an agency orders rate equalization without a sufficient basis, it does not merely deprive the carrier and the rate payor of abstract legal rights. Rather, as in the present case, it creates new rate discriminations; it causes unwarranted rate increases; and it compels carriers to cross-subsidize services having different costs. Furthermore, selective use of FCC Rule 61.38 to coerce carrier ac-

tion enables the agency to influence and even dictate rate structures. This power can be used to fix rates even though the agency lacks sufficient information to form a rational conclusion as to what rates are reasonable and despite the fact that the carrier and the rate payors have been deprived of any opportunity to address that question.

The decision below, by sanctioning these significant departures from previously well-settled principles in the field of common carrier rates, constitutes a serious and important precedent which may well be seized upon by other federal agencies to the detriment of the regulated industries and their public consumers. Review by this Court is essential lest a perversion of congressionally mandated procedures gain a foothold in the law. Taken together with the Fifth Circuit's ruling in *Mobil Alaska Pipeline Co.* v. *United States,* 557 F.2d 775 (5th Cir.), *cert. granted,* 98 S. Ct. 501, 54 L. Ed. 2d 449 (1977), this case evinces a trend within the federal agencies and the courts to ignore established procedures in order to permit the accomplishment of agency-desired results.

The victims of the FCC-imposed rates are the customers of an industry of great national significance. Telecommunications is one of the most important subjects of common carriage. The public is dependent upon communications carriers for the carriage of telephone calls, telegrams, telex, television, facsimile, computerized data, and countless other forms of communications. The FCC has jurisdiction over essential common carrier services whose annual revenues are measured in billions of dollars. There is a transcendent national interest in the reasonableness of telecommunication rates, and of all regulated common carrier rates. It is contrary to the public interest for an agency to unlawfully overturn existing rates and thereafter improperly prescribe higher rates which it endeavors to pass off as carrier-initiated. That public interest can be vindicated only if review is granted herein.

II. The Decisions Below Constitute a Significant Departure from the Previously Well-Established Rule Forbidding Rate Prescription by the FCC Without the Findings Mandated by Section 205(a) of the Communications Act.

The Commission's decisions effected a *de facto* prescription of the rates to be charged the IRCs for interconnection facilities in clear disregard of the statutory mandate (47 U.S.C. § 205(a)) that rate prescription is only authorized where the FCC first finds that the new rates will be "just and reasonable". In this regard, this case tenders issues closely analogous to those raised in *Mobil Alaska Pipeline Co.* v. *United States, supra.*[22] Furthermore, the decision of the court below is inconsistent with the decisions in *Moss* v. *CAB,* 430 F.2d 891 (D.C. Cir. 1970), and *American Telephone & Telegraph Co.* v. *FCC,* 449 F.2d 439 (2d Cir. 1971) (*"AT&T I"*).

An agency may deal with an unlawfully discriminatory rate in one of two ways. It may itself prescribe a rate which will be just and reasonable, or it may order the carrier to cure the discrimination by equalizing the rates in question at any level deemed appropriate by the carrier. *National Association of Motor Bus Owners* v. *FCC,* 460 F.2d 561 (2d Cir. 1972). *See also New York* v. *United States,* 331 U.S. 284, 340-41 (1947); *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande R.R.,* 233 U.S. 479, 486-88 (1914). If the agency elects to prescribe, it may do so only if it has first specifically determined, "after full opportunity for hearing", that the existing rate is unlawful, and then finds that the prescribed rate will be "just and reasonable." *See* 47 U.S.C. § 205(a); *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.,* 284 U.S. 370 (1932); *Nader* v. *FCC,*

[22] In *Mobil Alaska* this Court granted certiorari to review an agency's use of the power to suspend rates regarded as excessive in order to coerce the carriers to charge lower interim rates during the pendency of evidentiary hearings.

520 F.2d 182, 204 (D.C. Cir. 1975); *AT&T I, supra* at 451 n.12; *Moss* v. *CAB, supra.* If the agency chooses not to prescribe rates, then it must give the carrier freedom to abate the discrimination by raising one rate, lowering the other, or by altering both. As this Court wrote in *Texas & P. Ry.* v. *United States,* 289 U.S. 627, 650 (1933): "The situation must be such that the carrier . . ., if given an option, [has] an actual alternative." If the agency coerces the carrier into filing a particular tariff, that is rate prescription and the agency must comply with the statutory requirements for prescription. *AT&T I, supra; Moss* v. *CAB, supra; S.C.R.A.P.* v. *United States,* 346 F. Supp. 189, 197 (D.D.C. 1972), *rev'd on other grounds,* 412 U.S. 669 (1973).

There is nothing in the record herein which could support a prescription of rates by the FCC. The record is altogether devoid of economic data. The Commission allowed no hearing procedures appropriate either to elicit or to evaluate such data. Indeed, the Commission conceded that it has no idea of what would constitute just and reasonable rates for AT&T's offerings to either the domestic carriers or to the IRCs. (Opinion on Reconsideration, ¶ 40, Appendix D at 61a.) That is a matter, it said, which it will investigate at some later time after AT&T files cost data in December 1978.[23]

Because the Commission was unable to prescribe, it was required to leave to AT&T the choice of remedy for the unlawful discrimination which the agency had claimed to find. This the FCC did not do. AT&T had only one option: to raise the IRCs' rates to the higher domestic carrier level.

[23] It now appears that AT&T will not in fact file such data in December 1978. AT&T recently opposed the FCC's order that it file separate cost studies pertaining to the facilities offered the IRCs and domestic carriers. (*See* Reply Comments of AT&T, dated February 17, 1978, filed in *Offer of Facilities for Use by Other Common Carriers,* FCC Docket No. 21499, at 12 (which states that the "Bell System is not presently making any [such] cost studies . . .").)

When it filed the new tariff rates applicable to the IRCs, AT&T made it clear that its action was "required by the Federal Communications Commission." (September 20, 1977, AT&T letter to WUI, copy to FCC, included in the record below.)

The FCC's Decision directed AT&T to offer interconnection facilities to the IRCs on the "identical" terms and conditions as AT&T offers such facilities "in tariffs" to the domestic carriers.[24] AT&T was thereby forbidden to charge the IRCs any rate other than that contained in the tariffs applicable to the domestic carriers. Any rate differential would have required the filing of cost-justification material under 47 C.F.R. § 61.38. It is undisputed that AT&T could not, and cannot until December 1978 at the earliest, file such material. Furthermore, pursuant to the FCC's decision in *Offer of Facilities for Use by Other Common Carriers, supra* at 734-35, AT&T could not have changed the rates charged the domestic carriers without providing cost-justification data.[25] Thus, the FCC's manipulation of its cost-justification rule to impose an impossible burden upon AT&T if it chose to do

[24] "Further, if the rates and conditions vary from those included in tariffs offering similar facilities to . . . [the domestic carriers] we expect such differences to be fully justified with Section 61.38 [cost-justification] and other data. In the event facilities are offered to the IRCs on the identical terms and conditions as are given other carriers, we shall waive the Section 61.38 requirement until such time as AT&T files full justification for the various . . . [domestic] facility offerings." 63 F.C.C.2d at 767 n.8, Appendix C at 11a.

[25] While one may assume that the domestic carriers would not have objected to such a rate decrease, it cannot be assumed that no other person would have objected or that the FCC would have waived its cost-justification rule to permit such a decrease. A rate reduction for the domestic carriers might have rendered their rates unreasonably low or unlawfully discriminatory or preferential in comparison with rates charged other AT&T customers. Thus, the court of appeals had no reason to assume (Slip Opinion at 794, Appendix F at 89a) that AT&T could have lowered the rates for the domestic carriers to the lower IRC levels.

anything but increase the IRC rates to the level of the domestic carrier rates was nothing less than tariff prescription.[26]

Moreover, the FCC's disregard of proper legal standards was facilitated by its reliance on *ex parte* meetings with AT&T. The FCC and the court of appeals both misunderstood the nature of petitioner's objection to those meetings. (*See* Opinion on Reconsideration, ¶¶ 41-42, Appendix D at 63a-66a; Slip Opinion at 792-93, Appendix F at 87a-88a.) Thus, the court below held the IRCs were not prejudiced because the purpose of the meetings was not to influence the FCC with respect to the merits of the Decision or the forthcoming petitions for reconsideration. Viewed in their most favorable light, these *ex parte* meetings manifest the FCC's intense involvement in constructing AT&T's tariffs and confirm that they were all but authored by the FCC. The circuit court's disregard of the *ex parte* meetings presents a direct conflict with the better-reasoned decisions in *Home Box Office, Inc.* v. *FCC,* 567 F.2d 9 (D.C. Cir.), *cert. denied,* 98 S. Ct. 111, 54 L. Ed. 2d 89 (1977), and *Moss* v. *CAB, supra.*

The FCC and the court below attempted to justify the departure from established rate-making procedures by ruling that petitioner could recapture any unreasonably high rates imposed on it by instituting a new proceeding under 47 U.S.C. § 208. (Opinion on Reconsideration, ¶ 36, Appendix D at 57a; Slip Opinion at 792, Appendix F at 87a.) Section 208 was not intended to authorize recoveries with regard to rates prescribed pursuant to agency decision, for an agency-prescribed rate is, by definition, a lawful and

[26] "It would be blinking reality" to accept the circuit court's view that this case involves carrier-initiated rates because the FCC "did all that it could, short of formally styling its order as rate making, to induce . . . [AT&T] to adopt the proposed rates." *Moss* v. *CAB, supra* at 897-98. "To suggest that the rate is 'voluntary' . . . exalts form over substance. . . ." *Mobil Alaska Pipeline Co.* v. *United States, supra* at 802 (Roney, J. dissenting).

reasonable rate. *See Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry., supra* (suggesting that reparations may not be awarded where an agency has ordered the carrier to charge the rate in question). Furthermore, the imposition on petitioner of the burden and expense of new, protracted proceedings is not an adequate remedy to redress the immediate injury it is being caused to suffer.

III. The Decisions Below Constitute a Significant Departure from the Previously Well-Established Rule that the Mere Existence of a Difference between Particular Rates Does Not Establish a Violation of Section 202(a) of the Communications Act.

We begin with certain well-established rules of administrative law. First, an agency cannot compel a change in an existing rate unless it finds that that rate is either unreasonable (*i.e.*, too high or too low), preferential (*i.e.*, unduly favors one user or locality over another competing user or locality) or discriminatory (*i.e.*, unreasonably or unjustly different vis-a-vis a rate for other like services). *See, e.g., Aberdeen & Rockfish R.R.* v. *S.C.R.A.P.*, 422 U.S. 289, 311 (1975); *Nader* v. *F.C.C., supra; American Telephone & Telegraph Co.* v. *FCC*, 487 F.2d 865 (2d Cir. 1973) (*"AT&T II"*); *AT&T I, supra* at 451 and n.12. *See also Morgan* v. *United States*, 298 U.S. 468 (1936); *ICC* v. *Louisville and Nashville Railroad*, 227 U.S. 88 (1913). Second, the burden of proving discrimination[27] (*i.e.*, that there is no justification whatever for any rate difference) lies with the party challenging the existing (and therefore lawful[28]) rate.

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[27] In the instant case the FCC determined only that the IRC rates were discriminatory. (Opinion on Reconsideration, ¶¶ 18-25, Appendix D at 39a-45a.) There was no finding that those rates were unreasonable (because the data necessary for such an evaluation was and still is unavailable) or unduly preferential (because the IRCs do not compete with the domestic carriers).

[28] *See Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry., supra.*

Atchison, T. & S.F. Ry. Co. v. *Wichita Board of Trade*, 412 U.S. 800, 812-14 (1973). Third, the only remedy that may be imposed to correct unlawful discrimination in rates is an order requiring rate equalization. III-B I. L. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 530 (1936); *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573 (1949). Accordingly, before an agency may issue a rate equalization order, it must first have compiled a record that contains subtantial evidence to support a finding that there is no justification for the rate difference (*i.e.*, that the communication services at issue are sufficiently "like" so that different rates may not be reasonably or justly charged).

Thus, even assuming that the communication services performed by AT&T for the IRCs and domestic carriers, as described in the contracts and tariffs, are "functionally similar", the crucial question, whether there is any justification for the different rates charged those carriers, remains open. Prior to the decisions rendered herein it had been uniformly recognized that

> "[n]ot every variation in prices charged customers for a particular feature of the carrier's service supports a claim of unlawful discrimination. Since rate classifications, no less than other classifications, may be justified by differences between the classes, the mere existence of a disparity between particular rates does not establish a statutory violation. Much less can an allegation of discrimination safely be predicated upon a piecemeal comparison of classified tariff charges. . . .
>
> • • •
>
> . . . Standing alone, neither the fact of separate classification nor the fact of a difference in tariff charges exerts any real tendency to demonstrate a collision with the statutory prohibitions." *Associated Press* v. *FCC*, 452 F.2d 1290, 1300-01 (D.C. Cir. 1971).

That rule was first articulated by this Court in a case arising under the Interstate Commerce Act.[29] *Texas & P. Ry.* v. *ICC,* 162 U.S. 197 (1896). In that case goods traveling on through bills of lading in international commerce were charged lower rates than identical goods traveling identical routes via identical facilities in domestic commerce. Eschewing a mechanistic application of Section 2 of the Interstate Commerce Act, the Court upheld the disparate rates, stating that all of the facts of a given case must be considered and that "strict uniformity is not to be enforced." *Id.* at 219. Referring to the analogous question of undue or unreasonable preference, the Court held:

> "The mere circumstance that there is in a given case a preference or advantage does not, of itself, show that such a preference or advantage is undue or unreasonable, within the meaning of the act. Hence it follows that, before the commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts . . . ." *Id.* at 219-20.

Accord, L. T. Barringer & Co. v. *United States,* 319 U.S. 1 (1943).

There is simply no evidence in the instant record that even speaks to the issue whether the interconnection facilities involved herein are sufficiently "like" so that different rates may not be reasonably or justly charged. *Indeed, both the Commission and the Second Circuit admitted that it remains to be seen whether rate equalization is appropriate in this case or whether a rate difference is justified.*

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[29] Section 202(a) of the Communications Act is derived directly from Section 2 of the Interstate Commerce Act (S. Rep. 781, 73rd Cong., 2nd Sess. 4 (1934)), 49 U.S.C. § 2; it is similar to § 205(b) of the Federal Power Act, 16 U.S.C. § 824d(b); § 404 (b) of the Federal Aviation Act, 49 U.S.C. § 1374(b); and other statutes. *See* Natural Gas Act, 15 U.S.C. § 717c; Packers and Stockyards Act, 7 U.S.C. § 206.

(63 F.C.C.2d at 767 n.8, Appendix C at 11a; December 1977 Order, ¶ 2 and n.1, Appendix E at 72a; Slip Opinion at 792, Appendix F at 87a.) By nonetheless ordering immediate rate equalization the decisions below represent a significant departure from well-established principles of administrative law. They conflict with prior holdings of this and other courts and portend a major shift in agency policy. *See United States* v. *Illinois Central R.R.,* 263 U.S. 515, 524 (1924); *Dataphone Digital Service Between Five Cities, supra* at 797 (wherein the FCC held that technological differences in providing like services, even absent cost data, was sufficient to establish "at least potential cost differences," justifying "separate classification of services priced at different rate[s]. . . .")

Rather than eliminating unlawful discrimination, on this record the agency may have engendered it or created an unreasonable rate for the IRCs by forcing AT&T to equalize the interconnection rates for the domestic carriers and the IRCs.[30] Since it is undisputed that the Commission has no idea whether AT&T's costs for the provision of interconnection facilities to the IRCs are equal to or different from its costs for providing such facilities to the domestic carriers (or indeed what those costs are), the most that can be said is that the FCC has identified a potentially unlawful rate structure. Equally true, however, is the fact that the new rate structure is also potentially unlawful and the old rate structure was potentially appropriate. The public interest is, of course, served by eliminating rate differences that have been proven unlawful. The public interest does not, however, require the elimination of rate differentials simply because they may be unlawful; for, just as possibly, they may be lawful. We submit that this Court should review the FCC's actions in

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[30] It is unlawful to charge equal rates for services that are not equally costly to the carrier. III-B I. L. SHARFMAN, *supra* at 557; *Private Line Cases,* 34 F.C.C.2d 217 (1963).

order to speak to the important questions thus raised under Section 202(a) of the Communications Act.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit so that this Court may review the decision below.

New York, New York
March 17, 1978

Respectfully submitted,

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Appendix A, Federal Communications Commission Letter of June 6, 1974.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

June 6, 1974

In reply refer to:
9510

American Telephone & Telegraph Company
195 Broadway
New York, New York 10007

Attention: T. W. Scandlyn
Assistant Vice President

Gentlemen:

Presently, certain facilities which AT&T furnishes to international record carriers (IRC's) between the IRC's operating offices and their overseas facilities (earth stations and cable heads) and between and among their operating offices (e.g., New York and San Francisco gateways) are provided under contract rather than pursuant to tariffs. Similar facilities supplied to domestic satellite common carriers, however, appear to be tariffed (see, e.g., AT&T Tariff F.C.C. Nos. 265 and 266, Pacific Telephone and Telegraph Co. Tariff F.C.C. Nos. 123 and 124). Further, such facilities provided the IRC's within a single local distribution area have been recently made subject to tariff (AT&T Tariff F.C.C. No. 1, filed May 3, 1974).

In *Applications of AT&T For Authorization to Construct and Operate Five Earth Stations*, 42 F.C.C. 2d 654, 659-660 (1973), the Commission stated "One of the primary purposes of tariffs is to assure that carriers will provide facilities and services without discrimination. . . . We see no reason why tariffs should not be filed by the Bell Sys-

Appendix A, Federal Communications Commission Letter of June 6, 1974.

tem to cover facilities supplied to satellite licensees. The statutory requirement under our Act for filing of tariffs is based upon the national public interest in securing uniformity of treatment to all, to suppress unjust discrimination and undue preferences, and to prevent special and secret agreements, in respect to interstate wire and radio communications, and to that end to require that rates applicable thereto be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable except in a manner prescribed by statute."

In the recent *Bell System Tariff Offerings* decision in Docket 19896, FCC 74-457 (April 23, 1974), the Commission ordered AT&T to provide certain interconnection facilities to specialized common carriers and to file appropriate tariffs. Filings were made with the Commission May 3, 1974.

We therefore expect AT&T to file, within twenty days of the date of this letter, pursuant to Section 203 of the Communications Act and Part 61 of the Rules, appropriate tariffs upon not less than sixty days' notice, to reflect the offering of facilities referred to in paragraph one above.

Sincerely yours,

/s/ WALTER HINCHMAN
Walter R. Hinchman
Chief, Common Carrier Bureau

cc: International Record Carriers

Appendix B, Memorandum Opinion and Order of the Federal Communications Commission.

FCC 75-451

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INTERCONNECTION FACILITIES PROVIDED TO THE INTERNATIONAL RECORD CARRIERS	Docket No. 20452

MEMORANDUM OPINION AND ORDER

(Adopted April 23, 1975; Released May 7, 1975)

BY THE COMMISSION:

1. As noted in our Memorandum Opinion and Order in Docket No. 20099, released September 19, 1974,[1] certain facilities which AT&T furnishes to international record carriers (IRCs) between the IRCs' operating offices and their overseas facilities (earth stations and cable heads) and between and among their operating offices (e.g., New York and San Francisco gateways) are provided under contract rather than pursuant to tariffs. Similar facilities supplied to domestic satellite common carriers, however, are tariffed (*see*, e.g., AT&T Tariff F.C.C. Nos. 265 and 266, and Pacific Telephone and Telegraph Co. Tariff F.C.C. No. 123). Further, interconnection facilities provided to the IRCs within the gateway cities are also subject to tariff.[2] In answer to a June 6, 1974 letter from the Chief, Common Carrier Bureau, AT&T declined to file tariffs covering the provision of such facilities on the grounds that (1) the Commission has never specifically required such a filing, (2) such a filing would be inconsistent with the Bell/Western Union contract ruling in the Commission's decision in *Bell System Tariff Offerings*, Docket 19896, 46 F.C.C. 2d 413 (1974), and (3) the contracts have been mutually satisfactory to AT&T and each of the IRCs. It appears to us that there is no significant difference between the interconnection facilities provided to the IRCs and those provided under tariff to the specialized common carriers including domestic satellite common carriers. We therefore believe that a substantial question exists as to whether we should order AT&T to provide these facilities pursuant to filed tariffs rather than pursuant to contracts.

2. Within the gateway cities in which they are authorized to operate, the IRCs offer telex service from overseas points directly to their customers' premises. Similarly, the domestic specialized and satellite common carriers offer their services directly to their customers' premises. However, the IRCs offer international private line (sometimes referred to as "leased channel") service only between overseas points and their gateway city operating offices. Thus, the IRCs' gateway

[1] *Offer of Facilities for Use by Other Common Carriers*, 49 F.C.C. 2d 729 (1974).
[2] *Id.* See also Decision in *Offer of Facilities for Use by Other Common Carriers*, FCC 75-450 (released May 7, 1975).

city customers must obtain, directly from the local telephone company, the connecting facilities between the IRC's operating offices and the customers' premises. Therefore we will examine the question of whether it is in the public interest for the IRCs to require their gateway city private line customers to obtain, directly from the local telephone company, facilities between the customer's premises and the IRC's operating office. Inquiry into this matter will be confined to the presently established gateway cities, and will not, in any way, be concerned with the question of international private line service to hinterland customers.

3. Accordingly, IT IS ORDERED that, pursuant to the provisions of Sections 4 (i), 201–205, 211 and 403 of the Communications Act, an investigation is hereby instituted into the following matters.

(1) Whether the Commission should require the international record carriers to obtain entrance (both from cable heads and earth stations) and intercity facilities from AT&T pursuant to tariffs rather than contracts; and

(2) Whether the Commission should require the international record carriers to offer international private line service directly to the premises of the carriers' gateway city customers.

4. IT IS FURTHER ORDERED that AT&T, French Telegraph Cable Company, ITT World Communications Inc., RCA Global Communications, Inc., TRT Telecommunications, Inc. and Western Union International, Inc. are hereby named PARTIES RESPONDENT herein.

5. IT IS FURTHER ORDERED that any interested persons may participate herein by filing comments on the above matters within 30 days of the publication of this order in the Federal Register and replies within 15 days of the filing of comments.

6. IT IS FURTHER ORDERED that this is a restricted rulemaking proceeding and the Commission's decision herein will be based on matters submitted for or incorporated into the record herein.

7. IT IS FURTHER ORDERED that an original and 14 copies of all comments and replies shall be filed with the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

Appendix C, Final Decision and Order of the Federal Communications Commission.

Common Carrier, Interconnection, Carrier To Carrier International Carrier, Tariffs

Common Carrier's provision of entrance and intercity facilities to international record carriers on different terms and conditions than are provided to other carriers held to be unlawfully discriminatory. Carrier must provide facilities according to tariff.

F.C.C. 77-176

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
INTERCONNECTION FACILITIES PROVIDED TO THE INTERNATIONAL RECORD CARRIERS	Docket No. 20452

FINAL DECISION AND ORDER

(Adopted: March 8, 1977; Released: March 23, 1977)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

Introduction

1. We here consider the two issues designated for hearing in the above-captioned matter:

(1) Whether the Commission should require the international record carriers to obtain entrance (both from cable heads and earth stations) and intercity facilities from AT&T [the American Telephone and Telegraph Company] pursuant to tariffs rather than contracts; and

(2) Whether the Commission should require the international record carriers to offer international private line service directly to the premises of the carrier's gateway city customers.

52 FCC 2d 1014, 1015.

I. *Background*

2. In our Memorandum Opinion and Order terminating Docket No. 20099, 52 FCC 2d 727, 735 (1975), we noted that facilities used to connect the international record carriers' (IRCs) operating offices in gateway cities to their earth stations and cable heads (entrance facilities), and to their offices in other gateway cities (intercity facilities), are provided by AT&T to the IRCs by contract rather than pursuant to tariff. Each of the IRCs has an individual contract with AT&T for these facilities but all contain identical terms. This is so even though the same kind of entrance and intercity facilities are supplied by AT&T to specialized (SCC) and domestic satellite (DSCC) common carriers pursuant to tariff, as are certain interconnection facilities pro-

vided to the IRCs within the gateway cities.[1] The AT&T-IRC contracts were executed in 1968 and outline the terms and conditions of the leasing of the circuits, run from month-to-month, require ninety days' notice for termination by either party and contain an appendant rate schedule for the facilities concerned.[2] We note generally that the contract terms and conditions applicable to Bell's provision of the subject facilities, including charges, differ from those set forth in the applicable Bell tariff for the same kinds of facilities offered to domestic carriers.

3. The Settlement Agreement executed by the parties in Docket No. 20099 preserved the AT&T-IRC contracts while offering the same kind of facilities to the SCCs and DSCCs pursuant to tariff. In our Memorandum Opinion and Order accepting the Settlement Agreement as a disposition without prejudice we noted that "[w]e still believe that a substantial question exists as to whether we should order AT&T to provide these facilities pursuant to filed tariffs rather than pursuant to contracts, and we will take appropriate action on this matter in a separate order." 52 FCC 2d 727, 735 (1975). We further stated that

> "[s]ince the IRCs offer international private line (sometimes referred to as 'leased channel') service only between their gateway city operating offices and overseas points, we will also examine the question of whether it is in the public interest for the IRCs to require their gateway city private line customers to obtain, directly from the local telephone company, facilities between the customers' premises and the IRCs operating office."

Id. Therefore, we instituted this restricted rulemaking to examine the two issues.

4. Comments and/or reply comments on the above issues were filed by AT&T, RCA Global Communications, Inc. (RCA Globcom), ITT World Communications Inc. (ITT Worldcom), TRT Telecommunications, Inc. (TRT), Western Union International, Inc. (WUI), Carpenter Radio Company (Carpenter) and the Hawaiian Telephone Company (HTC). COMSAT General Corporation (COMSAT General) petitioned for a broadening of the scope of the inquiry to include issues concerning the provision of interconnection facilities by AT&T to the MARISAT carriers (COMSAT General, ITT Worldcom, RCA Globcom and WUI). AT&T and RCA Globcom opposed COMSAT General's petition on the basis of lack of relevance and untimeliness. The two issues which are the subject of this investigation present separate and distinct considerations and therefore will be discussed seriatim.

II. *Whether the IRCs Should Be Required to Obtain Entrance and Intercity Facilities Pursuant to Tariff Rather than Contract*

A. Contentions of the Parties

5. In support of their position that the individual contracts should be left in force the carriers argue that the IRCs and AT&T have ex-

[1] *Bell System Tariff Offerings*, Docket No. 19896, 46 FCC 2d 413 (1974), *aff'd, Bell Telephone Co. of Pennsylvania v. FCC*, 503 F.2d 1250 (3rd Cir., 1974), *cert. denied*, 422 U.S. 1026 (1975). Entrance facilities are provided by AT&T in Tariff FCC No. 255 and intercity facilities are provided under AT&T Tariff FCC No. 266.

[2] AT&T, in a September 17, 1976, letter, informed us that these contracts were recently expanded to include AT&T's provision of entrance facilities between the AT&T-owned earth stations in the newly operational AT&T/GSAT domestic satellite system and the IRC gateway cities of New York, Washington, San Francisco, Miami and New Orleans for use by the IRCs in providing U.S. Mainland/Hawaii services.

pressed unanimous satisfaction with the contractual relationship; that the contracts have facilitated high quality service by the IRCs; that no complaints have been lodged concerning the contractual agreements; that contract has traditionally been the method employed by AT&T in providing facilities to the IRCs; that AT&T has never discriminated against any IRC; and that the IRCs have "unique needs" which warrant special consideration. The IRCs further allege that certain negative consequences would flow from a switch from contract to tariff. They contend that the rates they would pay under a tariff would be higher than the contract rates, necessitating an increase in their charges to the public. Further, the IRCs foresee a threat to the uninterrupted continuance of present service standards if there is a disruption in their relations with AT&T and the foreign carriers. They contend that the latter will charge more for reciprocal services if the IRCs must raise their rates to compensate for higher entrance and intercity facility charges.

6. The IRCs also attempt to distinguish the nature of their relationship with AT&T from the relationship AT&T has with the DSCCs and SCCs. They contend that the Commission properly required AT&T to offer certain interconnection facilities to the DSCCs and SCCs pursuant to tariff because AT&T's position as a domestic competitor of the DSCCs and SCCs poses the threat of unlawful discrimination. But the IRCs argue that since they do not compete with AT&T domestically no threat of unlawful discrimination exists and a tariff is unnecessary. They also contend that in some cases the interconnection facilities provided are extensions of jointly-owned overseas cables and since the jointly-owned cables are governed by contract their extensions should be treated likewise. In the event we find against the contracts, the IRCs request that they be granted indefeasible right of user interests (IRU) in the subject facilities as an alternative to requiring the facilities to be offered to them pursuant to tariff.[3]

7. Finally, the IRCs argue that carrier-to-carrier contracts are recognized by Sections 201, 203 and 211 of the Communications Act of 1934, 47 U.S.C. §§ 201, 203, 211, and the principle of their validity has been acknowledged by this Commission in *Bell System Tariff Offerings, supra*. The IRCs further allege that Section 203(c) is a grant to the carriers of a choice between conducting their business pursuant to contract or tariff. Finally, the IRCs state that we may abrogate contracts only within the parameters set by *F.P.C.* v. *Sierra Pacific Power Company*, 350 U.S. 348 (1956) and *United Gas Pipe Line Company* v. *Mobile Gas Corporation*, 350 U.S. 332 (1956). The IRCs argue that these cases hold that abrogation of private contracts "may be undertaken by an administrative agency only where such action can be clearly demonstrated to serve the public interest." These cases also are said to prohibit abrogation by one of the parties merely by the filing of a tariff covering the services in question. Any change from contract to tariff, it is contended, may be required only after a "full hearing" pursuant to Section 205(a) of the Act.

8. HTC's pleading concerns the fact that in its area of operation HTC provides basically the same entrance facilities to the IRCs as

[3] AT&T argues that the IRU issue is not presented in this proceeding and requests notice and an opportunity to file an opposition before any decision is made in favor of granting IRUs. We agree with AT&T that IRUs are not in issue herein and thus we do not reach that question.

AT&T provides to the IRCs on the mainland. HTC contends, however, that its situation is uniquely distinguishable from that of AT&T and it thus requires different treatment. The claimed distinctions from the mainland are that HTC serves only one gateway city and thus provides no intercity facilities, that a variety of local facilities exists, such as microwave, coaxial cable and submarine cable, and that some of these HTC facilities are "hardened" for national defense purposes. HTC claims these "factual differences" from the mainland make HTC unique and justify its continued reliance on contracts. Additionally, HTC contends there are legal differences between its position and that of AT&T. Where AT&T is said to have made a public offering of facilities to other common carriers, HTC claims that HTC did not. It contends it has never taken the voluntary action which is the prerequisite to classification of its provision of facilities as a common carrier undertaking. HTC requests that any conclusions reached in this proceeding with respect to the issue of the continued use of individual contracts expressly except HTC.

9. In an abbreviated pleading Carpenter petitions us for an order directing AT&T and the United Telephone Company of Ohio to provide Carpenter with interconnection facilities for the provision of service to customers with portable communications equipment.

10. COMSAT General claims that encompassed by the scope of this inquiry are issues concerning the interconnection facilities to be used by WUI, RCA Globcom and ITT Worldcom in the provision of their respective MARISAT services. COMSAT General argues that the interconnection facilities provided by AT&T to the IRCs pursuant to contract are likely to be used by the IRCs in their provision of MARISAT services while COMSAT General will have to acquire similar interconnection facilities for use in its competing MARISAT services pursuant to tariff. This is said to create a potential disparity in rates charged by AT&T to competing MARISAT carriers for the same facilities in violation of Sections 201(b) and 202(a) of the Communications Act. COMSAT General requests that in the course of resolving the issues herein, we remove this potential inequity.

B. Discussion

11. We shall first dispose of procedural matters. The petitions of Carpenter and HTC are not relevant to this proceeding and will not be considered herein. Commission Rule 1.425, 47 C.F.R. § 1.425, states that this Commission will consider all "relevant" comments before taking action. The pleading submitted by Carpenter, however, is not even remotely related to the subject matter of this inquiry. HTC requests that it not be required to provide the interconnection facilities discussed herein to the IRCs pursuant to tariff rather than contract. But it is clear from the Designation Order in this docket, 52 FCC 2d 1014 (1975), that the provision of certain interconnection facilities to the IRCs and other common carriers *by AT&T* is at issue here, not the provision of such facilities by HTC. Therefore, HTC's request is not properly before us in this proceeding. Accordingly, we find that these pleadings lack relevance and therefore, without making any determination on the merits of either Carpenter's or HTC's claims, we find this to be an improper proceeding for consideration of their pleadings.

12. Even though COMSAT General's petition was untimely, we will consider it herein since the concern which prompted its filing, that continuation of the contracts would give the IRCs an unfair competitive advantage over COMSAT General in providing MARISAT services, is relevant and of decisional significance. The participating carriers in the MARISAT consortium are or will be competing head-to-head in the provision of commercial services to maritime customers. We find that COMSAT General and its MARISAT commercial customers may be disadvantaged by AT&T's provision of intercity and entrance facilities to COMSAT General's MARISAT competitors, the IRCs, on more favorable terms and conditions, including lower charges. As set forth hereinafter we are requiring AT&T to eliminate this inequitable treatment of certain carriers.

13. The public interest requires the provision of the subject facilities to all entities on the same terms, absent some justification for the difference. We find that the contract terms and the terms of the tariff, while providing similar service, are different and that no justification has been shown for such a difference. We conclude upon consideration of this record that AT&T's continued provision of entrance and intercity facilities to the IRCs on different terms and conditions than they are supplied to the SCCs and DSCCs is an unjustified discrimination in the provision of like communications services in violation of Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a).

14. The unjustified discrimination is that, under the contracts, AT&T provides the subject facilities to the IRCs on more favorable terms and conditions, including generally lower charges, than it affords the SCCs and DSCCs under tariff.[4] Thus, AT&T is able, under the current circumstances, to charge one rate to those with whom it competes and another to those with whom it does not generally compete. The potential for prolonged unlawful discrimination against DSCCs and SCCs (and thus indirectly their respective customers) is enhanced by the fact that the contracts with the IRCs contain no set termination date. We are not persuaded by AT&T or the IRCs that the provision of the subject facilities to the IRCs is somehow "unique" and justifies their favored treatment. The facilities provided to the IRCs are essentially identical to those provided to COMSAT General, and the DSCCs and SCCs, and the mere fact that the IRCs may connect their facilities to jointly-owned overseas cable or earth station facilities, which may be governed by contract, is irrelevant. We are particularly concerned that the charges to the IRCs may not be compensatory and the IRCs may be recipients of subsidy from other facilities customers of Bell or from Bell's interstate service offerings. Further, we fail to see how the provision of domestic facilities to the IRCs under AT&T tariffs could have any bearing on the IRC relationship with foreign entities.[5]

15. We also disagree with the contention that it is beyond our authority to modify or abrogate the IRC-AT&T contracts. The carriers

[4] Thus, the issue is not how AT&T treats the various IRCs respectively, but how it treats the IRCs as a group vis-a-vis other carriers including COMSAT General, DSCCs and SCCs.

[5] The IRCs allege that they would be required to increase their charges to the public if they obtain facilities from AT&T under tariff rather than under contract. In the event the IRCs attempt to increase their charges such tariff filings must, of course, be accompanied by economic material supporting the increased charges. 47 C.F.R. § 61.38.

have argued that the Communications Act recognizes and permits carrier-to-carrier contracts [6] and the choice of dealing with other carriers pursuant to tariff or contract is left to the carriers. The relevant references to carrier-to-carrier contracts in Title II of the Communications Act, cited by the parties, are:

> (1) [N]othing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract *with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest;* [47 U.S.C. § 201] [Emphasis added.]
>
> (2) No carrier, *unless otherwise provided by or under authority of this Act*, shall engage or participate in [common carrier] communications unless schedules have been filed and published in accordance with the provisions of this Act . . .; [47 U.S.C. § 203] [Emphasis added.]
>
> (3) (a) Every carrier subject to this Act shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this Act, in relation to any traffic affected by the provisions of this Act to which it may be a party.
> (b) The Commission shall have authority to require the filing of any other contracts of any carriers, and shall also have authority to exempt any carrier. . . . [47 U.S.C. § 211]

We cannot agree that these three provisions deny this Commission the power to modify or abrogate carrier-to-carrier contracts. First, the quoted provision of Section 201 is immaterial because all parties to the instant contracts are subject to the provisions of the Communications Act. Secondly, even if it were applicable Section 201 seems clearly to give us authority to measure any applicable contract against the public interest and nullify or modify those that are found wanting. This is so even though one of the parties to the contract is not subject to our jurisdiction. It would be anomalous for Congress to grant this Commission more power over those contracts than over contracts where both parties are within our jurisdiction. Thirdly, the filing requirement of Section 211 appears to us to imply that we do have the authority to pass on the contracts which must be filed; otherwise the filing requirement would be a meaningless exercise.

16. We have ruled previously that Section 211(a) contemplates our supervision of carrier-to-carrier contracts.

> While Section 211(a) does not specifically invest regulatory authority over the contracts, it is reasonable to conclude that the provision which requires the contracts to be filed confers upon the Commission the authority to determine whether the terms and conditions thereof are consistent with the provisions of the Act.

Bell System Tariff Offerings, 46 F.C.C. 2d 413, 431 (1974). In that decision we also concluded that *United Gas Pipe Line Company* v. *Mobile Gas Corporation*, *supra*, and *F.P.C.* v. *Sierra Pacific Power Company*, *supra*, recognized our authority to determine the propriety of the terms and rates of contracts. See 46 F.C.C. 2d at 435. Nor does *Bell Telephone Company of Pennsylvania* v. *F.C.C.*, 503 F.2d 1250 (3d Cir. 1974), hold to the contrary. The court in that case explicitly stated that it did not reach the issue of our power over carrier-to-carrier

[6] Under existing case law customer-carrier contracts are void and unenforceable. See *e.g.*, *United Video*, 55 FCC 2d 516 (1975); *Midwestern Relay Co.*, 59 FCC 2d 477 (1976); *Southern Pacific Communications Co.*, 59 FCC 2d 1116 (1976).

contracts. [7] We therefore reiterate our conclusion, stated in *Bell System Tariff Offerings*, *supra*, that the Communications Act implicitly authorizes us to modify or abrogate carrier-to-carrier contracts as we find is consistent with the public interest. In the instant case, however, it is not necessary for us to order abrogation or modification of the contracts.

17. Accordingly, we shall order AT&T to eliminate the inequitable and unlawfully discriminatory treatment of COMSAT General, DSCCs and SCCs vis-a-vis the IRCs. We have previously held that the most desirable means to insure that facilities of the kind in issue herein are provided to all carriers on reasonable and non-discriminatory terms is by the filing of tariff schedules. See *e.g.*, *Memorandum Opinion, Order and Authorization* (*AT&T Satellite Application*), 42 FCC 2d 654, 659 (1973). If this method is chosen to eliminate the discrimination we expect AT&T Long Lines Department and the Bell System Operating Companies to file such tariff schedules as may be necessary within 30 days of the publication of this Decision in the Federal Register, and on not less than 90 days notice to the public, to remove the continuing discrimination which we have found contravenes the public interests. [8]

III. *Whether the IRCs Should Be Required to Offer International Private Line Services Directly to the Premises of Their Gateway City Customers*

A. Contentions of the Parties

18. The IRCs contend that there would be no consumer benefit in requiring them to offer international private line service on an end-to-end basis within the gateway cities. They argue that since none of the IRCs have local distribution facilities, and it is economically infeasible to build them, they would acquire them from Western Union (WU) or the local telephone company, just as their customers do now. And they argue that since the IRCs normally make the arrangements for their customers to acquire the necessary facilities anyway, there would be no change in the facilities and little change in the way the customer's business is handled. The IRCs argue that since there has been no complaint concerning this existing arrangement and little will be changed by the proposed requirement, insofar as the customer is concerned, there is little or no advantage in imposing the change.

19. While the IRCs see little advantage to their customers in the proposed change, they allege great disadvantage to themselves. They

[7] 503 F.2d at 1279. We believe the court was correct in stating that the Act permits carriers to provide for the leasing of facilities by contract, as well as by tariff. *Id.* at 1278. This does not mean, however, that we lack authority to modify or abrogate any such contracts if we find them to be contrary to the public interest.

[8] We express no opinion herein regarding what particular tariff regulations, level of tariff charges, etc., AT&T should file to remove its inequitable treatment of carriers. However, we reserve the right to accept, reject, suspend or investigate whatever may be filed. Further, if the rates and conditions vary from those included in tariffs offering similar facilities to COMSAT General, SCCs and DSCCs, we expect such differences to be fully justified with Section 61.38 and other data. In the event facilities are offered to the IRCs on the identical terms and conditions as are given other carriers, we shall waive the Section 61.38 requirement until such time as AT&T files full justification for the various OCC facility offerings. In any event, within 30 days of the publication of this decision in the Federal Register, AT&T and the Bell System Operating Companies shall file a letter with the Commission giving a date certain for the filing of such full justification.

argue that, because Commission Rule 61.74, 47 C.F.R. § 61.74, prohibits the cross-referencing of tariffs, they would have to file their own complete tariffs, including rates based on cost averaging. This they claim would result in rate increases to some customers and decreases to others and would unfairly discriminate against the low-speed, minimum conditioned user. The IRCs also contend that their tariffed rates would have to be increased whenever the local telephone company charges for local distribution facilities, which IRCs would employ in their end-to-end services, were increased. This, they argue, would involve unnecessary paperwork and incur purposeless tariff filing fees.

20. The IRCs also attempt to distinguish international private line service, where they presently do not offer service directly to their customers' premises, from international telex service, where they do offer end-to-end service. The telex loop usage is part of the overall loop usage and the costs therefore are uniform, they argue, while dedicated private line loops vary greatly in cost and an averaged tariff would discriminate against the lower speed services. This is said to result from the inherent difference between a switched service like telex and a private line service using dedicated facilities. The averaged tariff rates would differ significantly from current rates we are told, because even the least expensive private line loop costs more than a telex loop. The IRCs argue that the DSCCs and SCCs offer tariffed end-to-end private line service only because they are forced to by their competitive status vis-a-vis AT&T and WU and, since the IRCs are not so compelled by competitive forces, they contend they should not be viewed in the same way.

21. Additionally, the IRCs advance arguments concerning the power of this Commission to make such an order. It is argued that where no discrimination exists the Communications Act prefers carrier-initiated tariffs—a preference they argue the proposed requirement would negate. They contend such a change in policy requires a showing by this Commission that the present method is objectionable and that the proposed change would produce identifiable benefits in the public interest. The IRCs also argue that the proposed requirement contradicts the Commission policy that AT&T offer the local distribution facilities directly to the IRCs' customers pursuant to tariff.[9]

B. Discussion

22. We find that any advantages to be gained from a requirement that the IRCs offer international private line service directly to the premises of their gateway city customers are either too minor or uncertain to justify our making such a demand on the IRCs. At the time this issue was designated for hearing we anticipated pleadings from current and potential IRC private line customers advocating such an offering. No such pleadings were filed, however, and we therefore conclude that there is no customer demand for the offering. Under the circumstances, we will not order the IRCs to offer private line service directly to their customers' premises.

[9] See Bell System Operating Companies Tariff FCC No. 3.

IV. *Conclusions*

23. We conclude, after a full consideration of this record, that AT&T shall be required to provide intercity and entrance facilities to the IRCs on the same terms and conditions as it offers those facilities to the SCCs and DSCCs.

24. We further find that the public interest does not, at this time, require that the IRCs offer their customers end-to-end private line service within the gateway cities.

25. Accordingly, IT IS ORDERED, That, pursuant to Sections 4(i), 201-205, 211 and 403 of the Communications Act, 47 U.S.C. § § 154(i), 201-205, 211 and 403, as amended, AT&T Long Lines Department and Bell System Operating Companies shall, within 30 days of the publication of this Decision in the Federal Register, and on not less than 90 days notice to the public if tariffs are filed, remove the unlawful discrimination in the provision of entrance and intercity facilities as between the IRCs and the DSCCs and SCCs.

26. IT IS FURTHER ORDERED, That the petitions for Carpenter and HTC ARE DISMISSED OR OTHERWISE DENIED for the reasons set forth in paragraph 10 and COMSAT General's petition IS GRANTED to the extent indicated herein.

27. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this Final Decision to be published in the Federal Register; and

28. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

Appendix D, October 1977 Memorandum Opinion and Order of the Federal Communications Commission.

Before the

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

FCC 77-694
83459

In the Matter of Interconnection Facilities Provided to the International Record Carriers	Docket No. 20452
Bell System Operating Companies Proposed Tariff FCC No. 4, Overseas Connecting Facilities for Other Common Carriers	Transmittal No. 5
American Telephone and Telegraph Company, Long Lines Department Proposed Revision to Tariff FCC No. 266, Facilities for Other Common Carriers	Transmittal No. 12758

MEMORANDUM OPINION AND ORDER

Adopted: October 13, 1977; Released: October 25, 1977
By the Commission: Chairman Wiley not participating.

1. We have before us petitions for reconsideration of our Final Decision and Order (Decision) in the above-captioned proceeding, 63 FCC 2d 761 (1977), tariffs filed by AT&T in response to that Decision, and petitions ob-

jecting to those tariffs. The carriers who have filed pleadings against the tariffs or filed reconsideration petitions are ITT World Communications Inc. (ITT Worldcom), RCA Global Communications, Inc. (RCA Globcom), TRT Telecommunications Corp. (TRT) and Western Union International, Inc. (WUI).

BACKGROUND

2. Our Docket No. 20452 proceeding, designated for hearing at 52 FCC 2d 1014 (1975), was initiated against the background of the proceeding in Docket No. 20099, *AT&T Offer of Facilities for Use by Other Common Carriers,* 52 FCC 2d 727 (1975). At issue in Docket No. 20099, to which the International Record Carriers (IRCs) were parties, were the Bell System's interconnection responsibilities (provision of various kinds of interconnection facilities) to non-telephone company common carriers such as the Domestic Satellite Common Carriers (DSCCs), the Specialized Common Carriers (SCCs) and the IRCs. One result of the Docket No. 20099 proceeding was a negotiated settlement, signed by all parties including the IRCs, under which the Bell System companies were obligated to provide DSCCs, SCCs and IRCs, under certain Other Common Carrier (OCC) facility tariffs, facilities to be used within cities and interconnected with interstate services. Another provision in the settlement provided that the Bell System companies would provide to the DSCCs and SCCs under other OCC facility tariffs entrance facilities (*e.g.,* between earth stations and operating offices) and intercity facilities (*e.g.,* between and among operating offices in different cities). The Settlement Agreement, however, included language that the IRCs had "unique needs" and that therefore the existing AT&T-IRC general leasing contracts providing

certain entrance and intercity facilities to IRCs should be retained.[1] Our order accepting, but not approving, the Docket No. 20099 Settlement Agreement placed the American Telephone and Telegraph Company (AT&T or Bell) and the IRCs on notice that we did not believe that the entrance and intercity facilities provided to IRCs under general leasing contracts should be treated any differently from similar facilities provided to DSCCs and SCCs under OCC facility tariffs. *See* 52 FCC 2d at 735. Indeed, it was evident from a reading of the tariffs and contracts that the contract facilities ("voice-grade circuits" in the terms of the contract) served the same communications function for the IRCs as the tariff facilities ("voice grade facilities" in the tariff language) did for the DSCCs and SCCs. *See, e.g.,* 52 FCC 2d at 747 and AT&T-ITT Worldcom General Agreement for Leasing of Circuits, p. 2. That is, the entrance facilities in both cases permitted interconnection of either earth stations, microwave terminals, or cable heads to operating offices, and the intercity facilities in both cases permitted interconnections between and among operating offices in different cities. Despite this functional similarity the contracts provided preferential rate treatment to the IRCs and we were particularly concerned that there was no termination date specified in the contracts. Further, it was significant that there was no consistency in the manner

[1] The IRCs allege herein that it is significant that no DSCCs or SCCs with the exception of COMSAT General Corporation (COMSAT General) intervened in Docket No. 20452 to challenge the AT&T-IRC contracts as unlawfully discriminatory. At a September 7, 1977 public meeting, *infra,* n. 6, a SCC representative indicated that the IRCs insisted on the insertion of the "unique needs" term into the Settlement Agreement. Moreover, in any event, the DSCCs and SCCs are merely abiding by the Docket No. 20099 Settlement Agreement by not participating in Docket No. 20452. Therefore, we place no significance on nonparticipation by DSCCs and SCCs in Docket No. 20452.

in which AT&T provided facilities to the IRCs. The IRCs received other facilities from Bell, interconnection facilities to be used within cities, under the same OCC facility tariffs as did the DSCCs and SCCs. At the time Docket No. 20452 was instituted no justification had been provided to the Commission or its staff by either AT&T or the IRCs which justified this *prima facie* discrimination in the manner in which AT&T provided facilities as between the IRCs and the DSCCs and SCCs.[2] Therefore, we initiated Docket No. 20452 to give AT&T and the IRCs the opportunity to rebut the presumption of unlawful discrimination which then existed, *i.e.,* we intended to give them the opportunity to show that the contract facilities in quesion were "unlike" those provided to DSCCs and SCCs under OCC facility tariffs, or that if they were "like", then any discrimination in their manner of provision was just and reasonable.[3] In

[2] Subsequent to the Docket No. 20099 Settlement the Chief, Common Carrier Bureau directed a June 6, 1974, letter to AT&T with copies to the IRCs, which questioned the existence of these contracts in light of certain Commission actions. The letter stressed the desirability of the IRCs taking facilities pursuant to tariffs, rather than contracts, and directed AT&T to file appropriate tariffs covering the entrance and intercity facilities provided to IRCs. In reply, AT&T and the IRCs alleged basically that "unique" facts or circumstances existed in international communications with respect to these facilities, that the parties were satisfied with the long-standing contracts, or that joint industry/Commission meetings should be held to discuss the matter. While the requested meetings were never held, the IRCs were nonetheless given a full opportunity to support their position in the Docket No. 20452 proceeding.

[3] The IRCs use the word "unique" interchangeably with "unlike" in their filings in this proceeding. "Uniqueness" does not necessarily mean that a facility or service is "unlike" for the purposes of Section 202(a) of the Act. The "unique" character of a facility or service may be merely one of many factors to be considered in seeking to determine whether or not an unlawful discrimination exists. Further, we do not agree that the facilities in question are "unique."

this connection, we have repeatedly held that discriminations between "like services" must be justified if they are to be lawful under Section 202(a). See, *e.g., Hi-Lo,* 55 FCC 2d 224 (1975), *on reconsideration,* 58 FCC 2d 362 (1976) and *DDS,* 62 FCC 2d 774 (1977), *reconsideration denied,* FCC 77-392, released June 20, 1977. In this case, not only was it incumbent on AT&T to justify the discrimination since it was the carrier whose conduct constituted a discrimination, but it was also incumbent on the IRCs as recipients of preferential treatment to show such treatment was justified.

3. The comments filed by AT&T and the IRCs in this proceeding were for the most part unresponsive to the above questions. The parties sought primarily to challenge the authority of the Commission to take any action at all with respect to the contracts or sought to introduce an issue not designated for hearing, namely, whether the IRCs should have indefeasible rights of use (IRUs) in the facilities in question.[4] See, *e.g.,* WUI Comments, pp. 2-4, 7-9 and RCA Globcom Comments, pp. 2-5, 8-9. Where the comments did address the alleged "uniqueness" of the AT&T-IRC contract facilities they did so only in the most general terms. For example, the IRCs argued that because the facilities in question were connected to jointly-owned

[4] Since the proceeding was not designated as a Section 214 proceeding and the IRCs did not file any formal procedural motions to enlarge the issues, we held in our Decision that IRUs were not in issue. Moreover, IRUs have never been granted previously to any carriers, domestic or international, in domestic facilities such as the ones in issue herein. To do so would require a substantial change in Commission policy which should be considered only in the context of a general rulemaking proceeding so that all interested parties may participate. *See* 63 FCC 2d at 763.

submarine cables that made them extensions of international cable facilities and therefore "unique" for that reason alone.[5] See, *e.g.,* WUI Comments, p. 5 and ITT Worldcom Comments, p. 6. They also argued that because they do not generally compete with AT&T, DSCCs or SCCs, that fact alone made the contract facilities "unique." See, *e.g.,* WUI Comments, p. 6 and RCA Globcom Comments, pp. 6-7. Further, where it was argued that retention of the contracts was in the public interest, speculative allegations were made by IRCs that obtaining these facilities under OCC facility tariffs would adversely impact relations with foreign correspondents, adversely impact the quality of IRC services, or lead to rate increases for IRC services. See, *e.g.,* RCA Globcom Comments, p. 8, and WUI Comments, pp. 6-7. The most repeated argument made by the IRCs was that because AT&T and the IRCs were satisfied with the contracts, retention of such contracts served the public interest. Finally, AT&T stated it was also satisfied with the contracts but would be willing to provide facilities under tariff if so ordered.

4. Based upon the existence of a *prima facie* discrimination, and in light of the unresponsive pleadings before us, which did not rebut the presumption that this discrimination was unlawful, we had no choice but to find that AT&T and the IRCs had not shown that the contract facilities were "unlike" those provided to DSCCs and SCCs under OCC facility tariffs. We had to further find that the *prima facie* discrimination had not been shown to be just and reasonable. We thus held, 63 FCC 2d at 765:

> 13. The public interest requires the provision of the subject facilities to all entities on the same terms,

[5] *Supra,* n. 3.

absent some justification for the difference. We find that the contract terms and the terms of the tariff, while providing similar service, are different and that no justification has been shown for such a difference. We conclude upon consideration of this record that AT&T's continued provision of entrance and intercity facilities to the IRCs on different terms and conditions than they are supplied to the SCCs and DSCCs is an unjustified discrimination in the provision of like communications services in violation of Sections 201(b) and 202(a) of the Communications Act, 47 USC §§ 201(b), 202(a).

14. The unjustified discrimination is that, under the contracts, AT&T provides the subject facilities to the IRCs on more favorable terms and conditions, including generally lower charges, than it affords the SCCs and DSCCs under tariff. Thus, AT&T is able, under the current circumstances, to charge one rate to those with whom it competes and another to those with whom it does not generally compete. The potential for prolonged unlawful discrimination against DSCCs and SCCs (and thus indirectly their respective customers) is enhanced by the fact that the contracts with the IRCs contain no set termination date. We are not persuaded by AT&T or the IRCs that the provision of the subject facilities to the IRCs is somehow "unique" and justifies their favored treatment. The facilities provided to the IRCs are essentially identical to those provided to COMSAT General, and the DSCCs and SCCs, and the mere fact that the IRCs may connect their facilities to jointly-owned overseas cable or earth station facilities, which may be governed by contract, is irrelevant. We are particularly concerned that the charges to the IRCs may not be compensatory and the

IRCs may be recipients of subsidy from other facilities customers of Bell or from Bell's interstate service offerings. Further, we fail to see how the provision of domestic facilities to the IRCs under AT&T tariffs could have any bearing on the IRC relationship with foreign entities. (Footnotes omitted.)

5. Having found an unjustified discrimination, we did not order AT&T to undertake any particular means to eliminate the unjustified discrimination, but left that choice up to AT&T, *e.g.*, it could expand the list of carriers subject to standard contracts or file appropriate tariffs. *See* 63 FCC 2d at 767, 769. According to the Commission's Decision such AT&T actions were to be taken on or before April 25, 1977. On April 15, 1977, AT&T requested additional time, until May 27, 1977, to implement the Commission's Decision. In its request for an extension of time, AT&T indicated it would utilize tariffs as the means to eliminate unjustified discriminations. By Order, FCC 77-273, adopted April 20, 1977 and released April 22, 1977, we granted AT&T the additional time. The IRCs filed petitions for reconsideration of our Decision and AT&T a petition for clarification, on April 25, 1977. By Order, FCC 77-361, adopted May 26, 1977, released June 9, 1977, we denied without prejudice RCA Globcom's request for stay of our Decision on the primary ground that AT&T's choice to file appropriate tariffs in compliance with our Decision would not result in any imminent irreparable injury to the IRCs because such tariffs had to be filed on not less than 90 days' notice to the public before they could become effective. We also indicated that since our Decision recognized that AT&T might provide the facilities in question to the IRCs on different terms and conditions than are applicable to facilities provided to DSCCs and SCCs with

appropriate justification, 63 FCC 2d at 767, it is possible that many of the concerns the IRCs state in their petitions for reconsideration of our Decision could be alleviated in light of the tariff revisions and justification filed. The primary reason for our position was that the IRC reconsideration petitions, filed before it was known how AT&T would comply with the Decision, contained much speculation regarding the remedy AT&T would choose to eliminate the unlawful discrimination. The IRCs assumed that AT&T would file tariffs and speculated about the content of such tariffs.

Therefore, we chose to wait until after AT&T initiated action to comply with our Decision before acting on such pleadings. On May 27, 1977, AT&T filed tariffs, discussed below, under which IRCs will be charged the higher OCC facility tariff rates for the facilities in question, rather than charging new tariff rates or including the DSCCs and SCCs within those carriers subject to standard contracts and the lower AT&T-IRC contract rates.[6]

[6] See revisions to OCC Facility Tariff No. 266, AT&T Long Lines Transmittal No. 12758, to be effective on August 27, 1977, and revisions to Bell System Operating Companies Tariff FCC No. 4, AT&T Long Lines, New Jersey Bell Telephone Company, and Southern Bell Telephone Company Transmittal No. 5, to be effective August 25, 1977. The effective date for these tariffs was deferred by AT&T until September 16, 1977, pursuant to request by the Common Carrier Bureau on June 29, 1977. See AT&T letter dated August 5, 1977, from C.E. Yates, AT&T Rate and Tariff Director, to Philip V. Permut, Acting Deputy Chief, Common Carrier Bureau. Pursuant to an exchange of letters between RCA Globcom, the Bureau, and AT&T the effective dates of the proposed tariffs were again deferred from September 16, 1977, until October 17, 1977. This deferral facilitated a public meeting on September 7, 1977 where certain issues concerning Docket No. 20452 and AT&T's proposed tariffs to implement our Decision were discussed. *See* September 9, 1977 letter from W.R. Young, Chief, Tariff Division to participants summarizing what was dis-

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THE CURRENT PETITIONS BEFORE US

6. Thus, before us for consideration are the April 25, 1977 petitions for reconsideration of RCA Globcom, WUI and ITT Worldcom and AT&T's petition for clarification. We also have before us the reply comments of WUI and ITT Worldcom filed on May 5, 1977. WUI, ITT Worldcom and RCA Globcom have filed petitions for rejection, and petitions for suspension and investigation, of the proposed tariffs filed by AT&T on May 27, 1977. TRT has also filed a petition for rejection. Bell has filed responsive pleadings to these petitions for suspension or rejection. Finally, WUI, RCA Globcom and ITT Worldcom all filed replies to AT&T's opposition to their rejection petitions. We consider AT&T's proposed tariff filings and pleadings with respect thereto separately at paras. 26-43 below. We consider petitions for reconsideration and clarification at paras. 7-25 hereinafter.

DISCUSSION—DOCKET NO. 20452

7. The IRCs in their reconsideration petitions, which were filed prior to submission of AT&T's proposed tariffs, argue for the retention of the AT&T-IRC general leasing contracts.[7] Primarily, the IRCs contend that the record in

(footnote continued from preceding page)

cussed at the public meeting. Finally, the effective dates of the tariffs were deferred again until October 28, 1977, following a request by the Chief, Common Carrier Bureau. *See* September 19, 1977, letter from Chief, Common Carrier Bureau to AT&T.

[7] We note that the IRCs' pleadings concern primarily entrance facilities. While they also argue in most cases for the retention of the contracts as they pertain to intercity facilities, few specific allegations, independent of arguments made with respect to en-

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Docket No. 20452 does not support a finding that AT&T's provision of intercity and entrance facilities by contract to the IRCs, but by tariff to OCCs, constitutes an unlawful discrimination under Section 202(a) of the Communications Act. 47 USC § 202(a). For example, ITT Worldcom argues that the conclusions reached by administrative agencies must be supported by substantial evidence, citing *N.L.R.B.* v. *Columbia Enameling and Stamping Co.*, 306 U.S. 292, 300 (1939). General findings, ITT Worldcom alleges, are not sufficient to support an administrative ruling unless they are supported by subordinate findings of fact that have an adequate basis in the record, citing, among other cases, *Florida* v. *U.S.*, 282 U.S. 194, 213 (1931). ITT Worldcom alleges that even if, with careful "parsing," the Commission's opinion could be read as including findings of the kind required by Sections 202(a) and 205, they are, on this record, "arbitrary and capricious." The findings, if any, ITT Worldcom alleges, are simply conclusory assertions which apply to the operating arrangements of AT&T and the IRCs and do not provide a "scintilla of support" for the Commission's Decision that these contracts are unjustly and unlawfully discriminatory vis-a-vis the SCCs, DSCCs and COMSAT General and that equality of

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trance facilities, are made in support of that position. Thus, irrespective of what may be decided with respect to entrance facilities, the IRCs have made no showing to justify preferential rate treatment for intercity facilities. Once again it should be noted that at the time the IRCs file their petitions for reconsideration, the manner in which AT&T would comply with the Commission's Docket No. 20452 Decision, *e.g.*, either filing appropriate tariffs containing existing or new rates or extending to all carriers the rates and conditions provided in the AT&T-IRC standard contracts, was speculative. The IRCs' reconsideration petitions assumed that AT&T would file tariffs and speculated about the content of those tariffs.

treatment is in the public interest in the international market. ITT Worldcom argues that the Commission has simply decreed a predetermined result without adequate explanation. The IRCs further claim that their requests for conferences or hearings have been improperly denied on several occasions and that the notice and comment hearing procedures utilized in Docket No. 20452 have denied them a full opportunity for hearing. This, they claim, resulted in an inadequate factual record to support the Commission's "unfounded" and "general" conclusions. They request that the Commission's Decision be set aside, an evidentiary or conference type hearing be held, or an oral argument *en banc* be convened.

8. The IRCs argue that such an evidentiary hearing or conference-type proceeding would have established, among other things, that the "tail" circuits (the IRCs' term for entrance facilities) provided to the IRCs under contract are "unique", meet the "discrete" needs of the IRCs, and are therefore distinguishable from entrance facilities provided by AT&T to DSCCs and SCCs under OCC facility tariffs, *i.e.*, that the facilities provided to the IRCs and the SCCs and DSCCs, respectively, are not "like services" within the meaning of Section 202(a) so there can be no unlawful discrimination. The following arguments in the RCA Globcom petition for reconsideration, pp. 4-9, are representative of the IRCs' position regarding the alleged "uniqueness" of the facilities in issue.[8] RCA Globcom alleges that neither

[8] As noted previously, the IRC pleadings filed in the Docket No. 20452 hearing itself contained mostly generalized assertions of "uniqueness" unsupported by factual allegations. Their petitions for reconsideration are somewhat more specific. Thus, most of the allegations of the IRCs in their petitions are before us for

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the location of international cable and satellite facilities nor the cities which are established as international gateways are under the control of the IRCs. Under these circumstances, RCA Globcom alleges that the IRCs are not in a position to locate the overseas transmission facilities they must use in close proximity to their gateway operating centers to minimize extension costs. Further, RCA Globcom argues that the SCCs' and DSCCs' main requirements are for end links and local loops from their operating centers to customer locations. According to RCA Globcom, the IRCs' primary needs, on the other hand, are for entrance facilities between the IRC operating offices and the AT&T network, extensions to cable heads which are operated by AT&T for the cable owners including the IRCs, and extensions to the U.S. Intelsat earth stations which are operated by COMSAT for the earth station owners including the IRCs. RCA Globcom asserts that the IRC trunk extensions are embedded in composite, long-haul facilities which involve different interface parameters and operating and maintenance procedures than the customer loops provided to the SCCs and DSCCs under OCC facility tariffs.

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the first time. None of the IRCs claim that the alleged "facts" they cite in their reconsideration petitions are new, were unknown to them, or otherwise could not be readily discovered for inclusion in their original Docket No. 20452 Comments. Nor is there any showing that the notice and comment procedure used in any way deprived the IRCs of a forum and full opportunity to present such "facts" to the Commission. We are at a loss to understand how the IRCs were deprived of due process by use of a procedure which is fully consistent with the Administrative Procedure Act and applicable case law for conduct of a rulemaking proceeding. *See* para. 11 below. We have, however, considered their new allegations on our own motion in order to make certain that we have all relevant facts before us. Thus, we are in effect considering *ab initio* the matters in issue in Docket No. 20452, thereby affording the IRCs still a second opportunity for hearing.

Also, RCA Globcom states that international satellite circuits entering the U.S. are not multiplexed into voice-grade circuits at the earth station but are transmitted through the AT&T network on a group or supergroup basis. It states further that the IRCs' circuits are mixed in with telephone circuits in these groups and do not have a discrete identity until they reach the AT&T operating center. Under these circumstances, RCA Globcom asserts that the IRCs cannot piece out their circuits at the earth station and transmit them by some other means unless the necessary channel translating equipment is installed for their circuits, and possibly AT&T's as well, at additional cost to the carriers and to COMSAT which would have to provide matching channel bank equipment. It contends that should the existing contractual arrangements be replaced by OCC facility tariffs, this may well have to be the case.

9. Moreover, RCA Globcom contends that the IRCs need the substantial operating flexibility presently provided under the existing contracts which it alleges heretofore have not been provided to SCCs and DSCCs under AT&T's OCC facility tariffs. For example, it alleges that OCC facility tariffs do not specify a "fixed loss" (decrease in the strength of the signal) from one end of the circuit to the other whereas the circuits the IRCs now receive from AT&T under their contracts provide for a "fixed loss." It contends that "such non-standardization" would complicate maintenance and other operational functions in international carrier systems and alleges that in order to standardize loss characteristics, it would be necessary to incur expenditures for the equipment required. Furthermore, RCA Globcom argues that in order to isolate faults to a particular section of the overall international channel for which the IRC is responsible, testing is required between an IRC's central office and the cable head. On the

other hand, under the "integrity of service" provision to the OCC facility tariffs, it argues that testing "could be prohibited" between the IRCs and the AT&T personnel who staff the cable heads and any other AT&T office in the link. Also, it argues that if the IRC entrance circuits were treated merely as tariffed facilities, the IRCs could be deprived of their present participation in joint planning efforts among the IRCs, AT&T and the foreign correspondents in determining how the system is configured and loaded.

10. RCA Globcom further contends that the IRC facilities in question have been specifically authorized by the Commission to carry only overseas—as opposed to domestic—traffic and that the IRCs do not generally compete directly either with AT&T or with the SCCs and DSCCs. RCA Globcom argues that the Commission fails to give any weight to this fact or the fact that the IRC facilities long predate the arrangements made for SCCs and DSCCs. Finally, it is argued by the IRCs that the Settlement Agreement in Docket No. 20099, *supra,* specifically noted the "unique needs of the (IRCs) between gateway cities and for entrance channels from cable heads and earth stations to those carriers' central offices in the metropolitan areas." *See* 52 FCC 2d at 735.

11. Turning first to the IRC claims that they were denied an opportunity for hearing in Docket No. 20452, that the hearing record was inadequate, and that our findings were therefore not justified, we note it is well-established that notice and comment hearings are entirely appropriate and that trial-type evidentiary proceedings are not required in every case. See, *e.g.,* the extensive discussion in *Resale and Sharing of Common Carrier Services,* 60 FCC

2d 261, 325-29 (1976), and the cases cited therein. Moreover, as set forth above, the IRCs were on clear notice of the matters in issue in Docket No. 20452 including their and AT&T's burden to prove a *prima facie* discrimination was just and reasonable. Despite such notice their pleadings in the Docket No. 20452 proceeding were unresponsive and failed to rebut the presumption of unlawful discrimination that led to the initiation of Docket No. 20452. Thus, what is involved here is not any failure on the part of the Commission to afford the IRCs a hearing opportunity, but rather it is a failure of the IRCs themselves to take full advantage of an opportunity given to show that any rate preference in their favor was justified.[9] Further, the failure of any of the IRCs to allege in either their Docket 20452 comments or reconsideration petitions relevant, specific facts and reasons for the necessity of an oral trial-type hearing, any necessity for cross-examination, any importance of witness credibility, any evidence that could only be presented orally, or, in general, any material facts which could not have been ascertained through use of the procedures employed herein, belies their claims that they were denied a full opportunity for hearing. *Cf., RCA Global Communications, Inc.* v. *FCC et al.,* Case No. 76-4054, Opinion released July 27, 1977, at p. 10 (2d Cir.). Moreover, as noted above, *supra,* n. 8, we have considered *ab initio* herein the matters at issue in Docket No. 20452, thereby affording the IRCs still a second opportunity for hearing. Accordingly, the IRCs' claim that they were denied an opportunity for hearing is without merit. In a related argument, ITT Worldcom alleges that there has

[9] For this reason, assuming *arguendo* the record in Docket No. 20452 could be considered inadequate in any respect, the fault lies with the IRCs themselves, and not with the Commission's choice of hearing procedures.

been an unlawful "abrogation" of contract by the Commission and an unlawful "prescription" of tariff rates without giving the IRCs a "full opportunity for hearing" as required by Sections 203 and 205 of the Act. 47 USC §§ 203 and 205. For the reasons given above, the IRCs were afforded a "full opportunity for hearing," although they may not have fully availed themselves of that opportunity. As to ITT Worldcom's other allegations, we find that there was no "abrogation" of contract[10] or "prescription" of tariff rates in Docket No. 20452 because as set forth at para. 5 above the choice of eliminating the unlawful discrimination was left to AT&T. *Cf., National Association of Motor Bus Carriers* v. *FCC,* 460 F. 2d 561 (1972). AT&T decided voluntarily, to terminate the AT&T-IRC general leasing contracts by giving notice of termination pursuant to the contract terms. *See* AT&T-ITT Worldcom General Agreement for Leasing of Circuits, p. 11. It subsequently filed proposed tariffs containing provisions and rates of its own choosing. Whether the remedy chosen by AT&T is an appropriate response is considered later herein.

12. We have already noted above the important functional similarity which exists between the contract facilities used by the IRCs and the tariff facilities used by the DSCCs and SCCs and why such facilities were "like" facilities for that reason. This holding is consistent with our Decision in *DDS* and *Hi-Lo, supra.* In both *Hi-Lo* and *DDS* we held that in determining whether or not two services were "like services" within the meaning of Section 202(a) of the Act, the communications function served by

[10] This is not to say the Commission does not have such abrogation authority. *See* 63 FCC 2d at 765-67.

such services was of significant importance in making such determination. *See* 55 FCC 2d at 230-31 and 62 FCC 2d at 795-97. We have also noted the importance of the communications function served by two services for determining whether or not services were "like services" in our recent Memorandum Opinion and Order rejecting in part AT&T's proposed WATS tariffs.[11] *See* FCC 77-529 at paras. 42-47, released August 12, 1977.

13. We next consider the IRCs' claims in their reconsideration petitions that the facilities covered by the AT&T-IRC general leasing contracts are "unique" and thus unlike those facilities offered to DSCCs and SCCs under OCC facility tariffs.[12] This, they claim, means that no discrimination exists within the meaning of Section 202(a) of the Act. Our Decision correctly held that the mere fact that the contract facilities were connected to jointly-owned submarine cables did not make them "unlike" as alleged by the IRCs. Indeed, facilities utilized in the domestic public switched network as well as in other domestic communication services can be similarly "connected" to the jointly-owned international cable facilities. Clearly, this does not make domestic public switched network facilities or facilities used in other domestic services "unique"

[11] See also our Notice of Inquiry in Docket No. 21402, FCC 77-653, released September 26, 1977, wherein we are seeking to determine whether WATS and MTS services, respectively, are "like services." In this Inquiry we are requesting parties to submit comments on the establishment of general standards or criteria to aid in the determination of "like service" questions. *See* FCC 77-653 at para. 6. Presently, we properly make such determinations on a case-by-case basis as we have done in Docket No. 20452.

[12] *Supra,* n. 3.

international facilities. In this respect, the IRCs are silent as to why they agreed in Docket No. 20099 to take interconnection facilities for use within gateway cities pursuant to AT&T's OCC facility tariffs at the same rates charged DSCCs and SCCs. According to the logic of the IRC position, such facilities for use within gateway cities, as is the case with the entrance and intercity facilities subject to AT&T-IRC contracts, can also be "connected" to jointly-owned international submarine cables. Significantly, no such argument was made by the IRCs. We cannot agree that the fact that the subject facilities can be connected to submarine cables renders them in any way "unique" or "unlike" the facilities provided to the SCCs and DSCCs. The facilities are technically similar with apparently the same costs[13] and the fact of their terminating in different facilities has no bearing on their being "like or unlike."

14. Moreover, the IRCs argue that the facilities in question are "unlike" OCC tariff facilities because they are engineered and operated to meet distinct international

[13] The IRC comments and reconsideration petitions filed in the Docket No. 20452 proceeding are devoid of any relevant factual allegations of the costs incurred by AT&T in providing the IRCs the facilities in question, *i.e.*, the IRCs do not allege it is less costly for AT&T to provide them the contract facilities than it is to provide tariff facilities to DSCCs and SCCs and thus that the lower contact charges are justified. In the absence of such allegations, we assume that costs must be similar for contract and tariff facilities and thus that any rate treatment must be similar. In the September 7, 1977 public meeting, *supra*, n. 6, an AT&T representative indicated that the contract facilities provided to IRCs are physically and essentially the same as those provided to OCCs and that it could not cost justfy a lower charge to the IRCs. See p. 2 of attachment to the Bureau's September 9, 1977 letter.

technical and operating requirements. However, the same argument can be made with respect to domestic facilities and services. For example, domestic public switched and private line networks are generally engineered and operated so that they can be utilized in connection with international services. We further note that even if there are technical or operating differences between two services such services can still be "like services" within the meaning of Section 202(a) of the Act. While considering whether or not AT&T's analog and digital private line services were "like services" for Section 202(a) purposes in *DDS, supra,* we held that there could be differences in the transmission, switching, or terminal technology used, or differences in the performance characteristics (*i.e.*, level of service quality associated with a technology or facility) but such differences alone did not make AT&T's analog and digital private line services "unlike" for the purpose of Section 202(a). *See* 62 FCC 2d at 796-97. Thus, even if there are some technical and operational differences between entrance or intercity facilities provided to IRCs under the general leasing contracts vis-a-vis entrance or intercity OCC tariff facilities, such differences alone do not require a finding, as alleged by the IRCs, that the contract facilities are "unlike" those provided under tariff. In this respect, we concede that there appear to be some differences in technical and operating arrangements applicable to the subject facilities, for example, it appears as RCA Globcom alleges that a certain performance level may pertain in the contract that did not apply in the OCC facilities tariffs.[14] Given the fact, however, that in *DDS* there were

[14] The fact that IRCs have received in at least one case voice grade circuits on a group or supergroup basis is not a significant

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even greater differences in the respective technologies (analog and digital) employed to provide two services than the technical and operating differences alleged here by the IRCs and given the fact that such technological differences alone did not lead to a finding in *DDS* that such services were "unlike," it cannot be found that the IRC allegations justify a finding that the contract facilities are "unlike" OCC tariff facilities. *See* 62 FCC 2d at 796-97. Moreover, the differences alleged by the IRCs do not alter the fact that the communications function of the contract and tariff facilities is essentially the same, *i.e.*, to meet the respective needs of the DSCCs, SCCs, and IRCs for connections between earth stations, microwave terminals, or cable heads and operating offices, and meet their respective needs for intercity connections between and among operating offices. This essential fact, which was the basis for our finding that the facilities in question were "like" facilities within the meaning of Section 202(a) of the Act (see para. 12 above), has not been rebutted by the IRCs.

15. The IRCs argue further that because IRCs are restricted by Section 222 of the Act, 47 USC § 222, to operations in gateway cities, while DSCCs and SCCs are not similarly restricted by Section 222, such circumstances

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difference. DSCCs may obtain facilities on the same basis under OCC facilities tariffs. See, *e.g.*, AT&T Tariff FCC No. 265, Section 3, original page 19. Further, we expect that Bell would be generally willing to meet a carrier's particular need for group or supergroup facilities under special construction provisions of applicable BOC facility tariffs. Also, it has provided group and supergroup facilities to Western Union Telegraph Company under the soon-to-be expired Western Union-AT&T contracts for many years.

make the contract facilities "unlike" those provided to DSCCs and SCCs under OCC facilities tariffs.[15] This argument is without merit. The Commission's Section 214, 47 USC § 214, regulatory authority may be utilized so as to constitute a comparable restriction on DSCCs' and SCCs' operations in particular geographical areas. Moreover, it is common practice for domestic carriers to limit their operations to particular geographical areas based on economic and other factors. Thus, if the IRC argument is taken to its logical extreme every carrier could claim it is entitled to special rate treatment from AT&T because its operations are limited to particular geographical areas. An additional circumstance cited by the IRCs in support of the alleged "uniqueness" of the contract facilities is that IRCs do not generally compete with AT&T, DSCCs and SCCs in the provision of domestic services.[16] Thus, they

[15] We note that a proceeding is pending in Docket No. 19660, 54 FCC 2d 909 (1975), in which consideration is being given to expanding the number of IRC gateway cities.

[16] The IRCs also challenge our finding that COMSAT General and its MARISAT commercial customers may be disadvantaged by AT&T's provision of facilities to the IRCs, COMSAT General's competitors, on more favorable terms and conditions, including lower charges. *See* 63 FCC 2d at 765. They claim that the Commission's reliance on the potential for harm to COMSAT General is "mere conjecture and surmise" and as such is not entitled to evidentiary weight. ITT Worldcom and RCA Globcom further note that on October 3, 1975, AT&T forwarded a letter to RCA Globcom wherein AT&T stated that it will lease facilities for use in the conduct of maritime satellite service on the same basis as voice-grade facilities contained in the OCC facility tariffs. Consequently, ITT Worldcom and RCA Globcom claim that both COMSAT General and the IRCs obtain facilities from AT&T for the provision of MARISAT services on the same basis and therefore the Commission's concern is moot. We agree that it appears

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claim, there can be no unlawful discrimination by AT&T against the IRCs (since the general leasing contracts for each IRC contain identical terms), or by AT&T as between the IRCs vis-a-vis DSCCs and SCCs. We disagree. As pointed out in our Decision, 63 FCC 2d at 765, the ultimate impact of any rate discrimination by AT&T in its provision of facilities to IRCs on the one hand, and to the DSCCs and SCCs on the other, could be on the rates paid by respective ratepayers of such carriers. Thus, *e.g.*, where the rate discrimination is unfavorable to a DSCC or SCC with whom AT&T competes domestically, as is the case here, the potential exists for AT&T to gain an unfair competitive advantage over DSCCs and SCCs via its position as a monopoly supplier of facilities to other carriers, both domestic and international. *See* 63 FCC 2d at 765, fn. 15. More particularly, the potential exists that lower rates for facilities offered to IRCs could be cross-subsidized by revenues obtained from higher priced facilities provided to SCCs and DSCCs under tariff, or that AT&T's customer service offerings could provide such a cross-subsidization. Our "concerns" about possible unlawful cross-subsidization can hardly be considered improper, as alleged by the IRCs, in light of the extensive litigation in our Docket No. 18128 proceeding, 61 FCC 2d 587 (1977), *on reconsideration,* FCC 77-385, released June 13, 1977,

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our paricular concern with respect to MARISAT has been mooted by the AT&T letter, which post-dated the record comments filed in Docket No. 20452. However, the fact that the IRCs will receive domestic facilities from AT&T to use in connection with their MARISAT services under OCC facility tariffs again highlights the inconsistency in the manner in which the IRCs receive facilities from Bell. *See* para. 2 above.

further reconsideration pending, and *DDS, supra,* where we in fact found instances of such cross-subsidization. The effect of our Decision was a directive to AT&T to avoid the potential for this kind of unlawful discrimination by taking an appropriate action of its own choosing to treat IRCs, DSCCs and SCCs on the same basis when it provides them "like" entrance and intercity facilities. Based on the foregoing, we conclude that our Decision correctly treated the AT&T-IRC general leasing contract facilities as functionally "like" those facilities provided to DSCCs and SCCs under OCC facility tariffs (see para. 12 above). In any event, any discrimination is illegal *per se* under Section 202(a) unless it is justified and this has not been done (see below).

16. The IRCs argue in the alternative that even if the entrance and intercity facilities in question are "like" those facilities offered to DSCCs and SCCs under tariffs, any discrimination that may exist in terms of rates, terms, and conditions is just and reasonable within the meaning of Section 202(a). They contend such discrimination is just and reasonable because of the "uniqueness" of the facilities involved and because of the "unique" circumstances under which such facilities are offered to IRCs. See paras. 12-15 above for the IRCs position. The IRCs also allege that if operating and technical arrangements, *e.g.,* transmit and receive levels and fault isolation procedures, pertaining to the contract faciilties are eliminated and comparable OCC facility tariff provisions are substituted in their place, the quality of the IRCs' services will suffer. Further, they allege that rates for IRC services will have to be increased due to the need to add additional equipment not provided for in OCC facility tariffs and as

a result of the increased facility charges which must be paid to AT&T under OCC facility tariffs.[17]

17. In addition to alleging possible adverse impact on IRC ratepayers, the IRCs allege that the Commission has ignored the impact its Decision may have on relationships of the IRCs and AT&T with foreign telecommunications entities and the "likely" reciprocal increase in foreign transiting charges that will impact U.S. carriers. For example, WUI argues that if the "transiting tail circuits" through the United States furnished to the foreign telecommunications entities principally by AT&T, citing, *e.g.*, paras. 5(a)(b), TAT-6 Agreement, May 2,, 1973, and to a lesser extent by the IRCs via the AT&T/WUI facilities contract, are furnished to such foreign entities under higher-priced OCC facility tariffs, there will be substantial increases in U.S. "transiting tail circuit" costs to the foreign entities. Reciprocally, it is claimed these foreign entities can be expected to increase their charges to AT&T and the IRCs for their "transiting tail circuits" across foreign countries to reach more distant foreign terminal countries. WUI claims that the Commission has not considered in the Decision AT&T's contractual obligations to furnish U.S. "transiting tail circuits" to foreign entities, which obligations are contained routinely in all cable construction agreements on file with the Commission, including the TAT-6 contract. Absent such consideration, WUI contends that the Commission could not even be "concerned" that the IRCs might be receiving a subsidy through their existing contract rates with AT&T. WUI also argues

[17] WUI estimates that the Decision will result in increased facility charges for the IRC industry of upwards of $4 million annually. RCA Globcom estimates the impact on it individually as $1.5-2.0 million annually in increased facility charges.

there might be a substantial negative net financial impact upon AT&T if it raises its charges to both the IRCs and the foreign entities for U.S. "tail" circuits, and thereby incurs higher reciprocal foreign transiting charges. Therefore, WUI concludes that increased charges by AT&T via OCC facility tariffs to the IRCs for "tail" circuits now provided under lower-priced contracts will inevitably lead to higher charges by AT&T to the foreign entities. WUI contends that the Commission has ordained this result by stating, 63 FCC 2d at 765, that " '[t]he public interest requires the provision of the subject facilities *to all entities on the same terms,* absent some justification for the difference.' " (emphasis by WUI). Finally, it is argued that the Decision, to the extent it may result in increased costs for international telecommunications facilities, is contrary to our Order in Docket No. 18875, 30 FCC 2d 571, 60 FCC 2d 451 (1976), wherein the Commission has expressed its concern about costs incurred with respect to foreign telecommunications facilities as they might impact upon the U.S. carriers and their ratepayers. Thus, for the above reasons, the IRCs contend that any discrimination that may exist in the manner in which AT&T provides entrance and intercity facilities to the IRCs is just and reasonable.

18. The IRCs' reliance on the alleged "uniqueness" of the facilities AT&T provides them under general leasing contracts and their alleged "unique" status as international carriers as reasons for justifying any discrimination by AT&T in their favor is misplaced. Their additional allegations of dire consequences to the quality and cost of IRCs' services if they are required to obtain facilities from AT&T under OCC facilities tariffs are unsupported by record evidence. For the reasons stated at paras. 12-15 above, we cannot find that the IRCs as carriers, or the

facilities in question, are so "unique" that any discrimination by AT&T in favor of the IRCs is *ipso facto* just and reasonable. Moreover, the dire consequences to the quality and cost of IRC services alleged by the IRCs as a result of our Decision are nothing more than speculation. As noted previously, these IRC allegations were made prior to the tariff filings made by AT&T. Thus, the IRCs were speculating at the time they filed their reconsideration petitions both that AT&T would file tariffs and about the content of such tariffs. They engaged in such speculation despite the fact that our Decision recognized that with appropriate justification AT&T could provide entrance and intercity facilities to IRCs at different rates, terms, and conditions than those facilities were provided to DSCCs and SCCs. *See* 63 FCC 2d at 767. However, as it turns out, any possibility that technical and operating difficulties will arise, as speculated by the IRCs, is remote because the tariffs AT&T chose to file make no substantial changes in operating and technical arrangements which govern the manner in which entrance and intercity facilities are presently provided to IRCs. *See* para. 38 below. As noted above, and at para. 38 below, these differences alone do not make the facilities in question "unlike" those AT&T provides to DSCCs and SCCs. While AT&T proposes to charge the IRCs the higher OCC facility tariff rates, rather than charging all carriers including DSCCs and SCCs the lower AT&T contract rates or a totally new rate, we note that this was a remedy of AT&T's own choosing and not the Commission's. However, as noted at paragraph 40 below, AT&T will be required to fully justify in an investigation its various OCC facilities tariff charges. In regard to the IRC claim that our Decision requires an increase in rates for IRC services we note, as we did in our Decision,

that any changes in rates by IRCs alleged to be a result of our Decision must be fully cost justified. *See* 63 FCC 2d at 765 and para. 40 below.

19. The IRCs also allege that any discrimination by AT&T in their favor is justified by the possibility that U.S. carriers' relations with foreign correspondents will be adversely impacted by our Decision. Our Decision did not see how the provision of domestic facilities to IRCs by AT&T could affect relations with foreign correspondents. *See* 63 FCC 2d at 765. The IRCs allege that any increase in facilities charges to the IRCs must also apply to the U.S. transiting facilities provided by AT&T to foreign correspondents. Such increase, they allege, will cause reciprocal increases for transiting facilities provided to U.S. carriers by foreign correspondents overseas. At the outset, we must stress our statutory responsibility to enforce Section 202(a) of the Act with respect to all carriers subject to our jurisdiction, international and domestic. Our statutory obligation to prevent unlawful discriminations under Section 202(a) with respect to *all* carriers is not circumscribed by the fact that there may be foreign entities not subject to our jurisdiction which may be directly or indirectly affected by our actions. *Cf., Transpac-11,* 57 FCC 2d 1103, 1107-08 (1976). Moreover, assuming *arguendo* that AT&T may be obligated by provisions of cable agreements to charge IRCs and foreign correspondents the same facilities charges as alleged, once again we note that such charges by AT&T are a result of its own choosing and not the Commission's. In complying with our Decision, AT&T was free to choose a method of eliminating unlawful discrimination which would have resulted in lower charges to IRCs, DSCCs and SCCs (and foreign correspondents if it is required to charge them rates equivalent to IRC rates).

In this regard, we are not aware of any instance where AT&T has undertaken steps to change transiting charges paid by foreign correspondents.[18] In view of the foregoing, we cannot find that the discrimination in the IRCs' favor has been justified and we reaffirm our finding that AT&T must remove the existing discrimination.

20. Unlike the IRCs, AT&T does not challenge our findings that an unjustified discrimination exists and that it must take appropriate steps to eliminate it. In its petition for clarification AT&T indicates that it will file appropriate tariffs to implement the Commission's Decision. These proposed tariffs have now been filed and are discussed below. However, AT&T states further in its petition that its analysis has disclosed a number of "unique situations" which may not have been contemplated by the Commission when it issued its Decision and which, in AT&T's opinion, may not be appropriate for inclusion in the tariffs AT&T files to comply with the Decision. AT&T has taken no action on these "unique situations" pending our ruling on its petition. AT&T claims certain facilities are furnished to specific IRCs which, for varying reasons, are "unlike" any facilities furnished to SCCs and DSCCs, and were not within the scope of our Decision herein.

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[18] We stated in our Decision that AT&T must provide facilities "to all entities on the same terms, absent some justification for the difference." *See* 63 FCC 2d at 765. Inasmuch as the transiting facilities provided by AT&T to foreign correspondents were not before us in Docket No. 20452 we take no position on whether or not AT&T may provide such facilities on a different basis to foreign correspondents. However, if different charges are made, we will expect AT&T to be able to justify such differences.

21. Specifically, AT&T currently furnishes one IRC with one telegraph grade circuit between the IRC's Miami gateway and the submarine cable station at Key West, Florida, where it is connected to facilities of the Cuban American Telephone Company and is extended to Cuba. AT&T states that this facility was provided since it was the only feasible means to satisfy an IRC requirement for a private line telegraph channel to Cuba to fulfill an order from a foreign government. AT&T furnishes another IRC with one group bandwidth (48 kHz) facility between the IRC's operating center in Washington, D. C. and the INTELSAT System earth station in Etam, West Virginia, with interfaces at high frequency in connection with a unique NASA overseas service provided by the IRC. AT&T states that at the time it was installed the IRC's requirement could not be met in any other practical manner. AT&T indicates that it does not propose to offer telegraph grade and group high frequency interface facilities for wideband facilities to the IRCs in the future and that neither is offered to SCCs or DSCCs. It requests clarification as to whether it may continue providing the limited telegraph grade and group high frequency facilities that are currently provided under existing contract arrangements with the IRCs concerned.

22. AT&T states that it also provides facilities to the IRCs in connection with restoration of services in the event of a failure in a trans-oceanic submarine cable system, or in an INTELSAT satellite systems path. According to AT&T, these facilities are provided in accordance with restoration plans developed with and agreed to by the participating U.S. international carriers, COMSAT and foreign correspondents and such plans have been filed with the Commission. They involve the taking of

actions under certain contingencies which are not included in the terms and conditions offered in connection with furnishing facilities under tariffs to SCCs and DSCCs. When a failure occurs in an international facility, these restoration arrangements involve temporarily rerouting circuits in an interrupted system to preassigned facilities extending to another cablehead or to another earth station. AT&T states its belief that the Decision does not relate to the furnishing of facilities in accordance with these international restoration plans because the circumstances are dissimilar to any involving SCCs and DSCCs, and requests the Commission to clarify this point.

23. Finally, AT&T, pursuant to contract, currently provides three IRCs with television transmission facilities in New York City and San Francisco and between those cities and INTELSAT System earth stations. According to AT&T such facilities are used by the IRCs in providing overseas television service which is offered by the IRCs and AT&T, pursuant to Commission Order, 18 FCC 2d 402 (1969), on a weekly rotational basis under a joint tariff. The intercity facilities furnished to the IRCs[19] are being provided on an occasional use basis at charges based on an initial 10 minute minimum rate plus an "each additional minute" charge. If intercity television facilities were provided under OCC facility tariffs, they would be provided on a monthly basis. Accordingly, AT&T requests clarification as to whether AT&T may, in compliance with the Commission's Decision, provide intercity television

[19] According to AT&T, the local channel facilities furnished the IRCs are physically the same as those offered by Bell System associated companies in the OCC facility tariffs and they are not, therefore, the subject of AT&T's request for clarification.

facilities to the IRCs on the above-described part-time basis while making similar facilities available to other carriers only on a full-time, monthly basis in light of the asserted facts that: "(i) the contractual arrangements for TV facilities were not considered in this proceeding; (ii) overseas television service is provided under an arrangement whereby each IRC provides service only one week out of four; and (iii) the offering that is made to the public by AT&T and the IRCs under the Joint Overseas Television Service Tariff (FCC No. 2) is also on an occasional part-time basis."

24. As noted previously, the facilities at issue in Docket No. 20452 were provided under the identical general leasing contracts AT&T has with each IRC. We did not intend to consider the appropriateness of AT&T's other contractual arrangements with individual IRCs, or with the IRCs jointly, in Docket No. 20452. However, the instances raised by AT&T, and any other contractual arrangements it may presently have with IRCs, must now be considered. Therefore, we will initiate a proceeding in the near future to consider those other contractual arrangements. In that proceeding, as was the case in Docket No. 20452, AT&T and the IRCs will have a reasonable opportunity to justify any preferential treatment given by AT&T to IRCs vis-a-vis SCCs and DSCCs and to justify their claim that no unreasonable discrimination exists.

25. In summary, we have shown above the reasons why our Docket No. 20452 Decision must be affirmed. We turn next to the proposed tariffs filed by AT&T pursuant to our Docket No. 20452 Decision and the pleadings filed with respect thereto.

AT&T'S PROPOSED TARIFFS

26. Although we discuss AT&T's proposed tariffs in further detail below, we believe a brief summary would be useful. As noted above, *supra,* n. 6, on May 26, 1977, AT&T filed Bell System Operating Companies' (BOC) Tariff FCC No. 4, which proposes to offer the IRCs "Overseas Connecting Facilities" at the same tariff rates applicable to entrance facilities provided to DSCCs and SCCs under other OCC facilities tariffs. *See* BOC Transmittal No. 5, pp. 1-2. The rates paid by DSCCs or SCCs for entrance facilities and which would also be paid by the IRCs under the proposed tariff, are contained in the applicable Bell System operating company's tariff in a particular state. The various facilities rates contained in these OCC tariffs were set by AT&T at a level equal to each state's private line rates with substantial discounts for intraexchange and interexchange facilities up to 40 miles. Thus, AT&T cross-references state private line tariffs to establish OCC facilities rates which would include the proposed charges to the IRCs. The "Overseas Connecting Facility" tariff is intended by AT&T to be the "direct equivalent" of the entrance facilities currently provided to the IRCs pursuant to the general leasing contracts. AT&T indicates that no "essential change" in the manner in which such entrance facilities are presently furnished to IRCs (*i.e.,* in terms of engineering, operating practices, testing, etc.) will result except as to the charges to be paid. *See* BOC Transmittal No. 5, p. 2. The AT&T tariff filing also provides that the intercity facilities in question will be provided to the IRCs pursuant to the same tariff rates charged to SCCs and DSCCs under existing AT&T Tariff FCC No. 266, the OCC facility tariff applicable to intercity facilities. We note that Tariff FCC

No. 266 cross-references rates contained in AT&T Tariff FCC No. 260, AT&T's interstate customer private line tariff. The manner in which AT&T develops charges for entrance and intercity facilities provided under OCC facility tariffs, *i.e.,* basically by cross-referencing intrastate or other interstate tariffs, is in accordance with provisions of the Settlement Agreement in Docket No. 20099, *supra.* The Settlement Agreement recognized that OCC facility tariff rates would not be cost justified until some future date and that until such justification was provided interim negotiated rates would apply. By letter dated May 26, 1977, AT&T indicated it would endeavor to file full justification for OCC tariff rates on or before December 1, 1978. The Commission has granted waivers of Section 61.38 (which requires cost justification) and 61.74 (which prohibits cross-referencing to other tariffs) of the Rules, 47 CFR §§ 61.38 and 61.74, to facilitate implementation of the Settlement Agreement. *See* 52 FCC 2d at 737. These rules were also waived for AT&T's instant tariff filing. *See* Common Carrier Bureau Special Permission No. 8372. Upon the effectiveness of the proposed tariffs the existing general leasing contracts will terminate. AT&T has already given such termination notice pursuant to the contract notice provisions. As noted previously, *supra,* n. 6, AT&T has deferred the effective date of these proposed tariffs from August 25, 1977 until October 28, 1977.

27. WUI, RCA Globcom, ITT Worldcom and TRT all seek rejection of AT&T's proposed tariff filing. ITT Worldcom alleges that before the tariffs became effective it should first be permitted the opportunity to purchase IRUs in the subject facilities in accordance with previous Commission policies which it claims support ownership interests by carriers in various facilities as a means

of reducing charges to the public. Secondly, ITT Worldcom alleges that AT&T's tariff filing conflicts with the Commission's Docket No. 20452 Decision and certain Commission Rules because: (a) AT&T did not submit the appropriate cost justification required by Section 61.38 of the Commission's Rules, 47 CFR § 61.38; and (b) because the proposed tariff filing conflicts with Sections 61.74 and 61.55 of the Commission's Rules, 47 CFR §§ 61.55 and 61.74, which require clarity in tariffs and prohibit cross-referencing of rates and charges between different tariffs. Finally, it contends that Commission acceptance of AT&T's tariff proposal prior to a ruling on ITT Worldcom's petition for reconsideration of the Docket No. 20452 Decision would constitute a denial of procedural due process.[20] After rejecting the tariffs, ITT Worldcom argues that the Commission should institute an expedited hearing into whether the facilities provided to the IRCs, SCCs and DSCCs are "like services"; whether any discrimination that may exist is just and reasonable; whether AT&T's proposed tariff provisions are just and reasonable; and whether the IRCs should be given IRUs in the subject facilities.

28. TRT seeks rejection on the grounds that: (a) AT&T's proposed tariff charges have not been cost justified by Section 61.38 or other data; (b) the proposed rates violate Section 202(a) of the Act because, due to cross-referencing of tariffs, such rates are the same rates charged to the public for AT&T intrastate and interstate private line services; (c) the charges to the IRCs have been developed on the basis of higher cost, customer private line services on low density routes, rather than on cost, transmission, and route density characteristics peculiar to

[20] This argument is mooted by our disposition of the reconsideration petitions herein, paras. 7-25 above.

the IRCs; and (d) the proposed charges have not been shown to be just and reasonable under Section 201(b) of the Act, 47 USC § 201(b). TRT concludes that retention of the contract rates pending submission of cost information by AT&T is desirable, rather than allowing AT&T to implement "patently" unlawful rates without any justification.

29. RCA Globcom seeks rejection primarily on the grounds that: (a) there has been no showing that the tariff scheme proposed by AT&T to replace the intercarrier contracts is just and reasonable in accordance with Section 201(b) of the Act in view of the "special requirements," *e.g.,* in operating practices and quality of service, applicable to the international entrance facilities in issue; (b) that the tariff will result in unlawfully discriminatory charging provisions for identical facilities depending upon whether such facilities are taken on the East coast or the West coast contrary to Section 202(a) of the Act;[21] (c) that the tariff will result in a "discontinuance, reduction, or impairment of service" previously provided, *i.e.,* a withdrawal of temporary circuits for short term use and groups or supergroups of voice grade facilities, without appropriate Section 214(a), 47 USC § 214(a), approval; (d) that

[21] Different OCC facility tariff charges would apply depending on the geographical location of the particular facility. This is a consequence of the OCC facility tariffs filed pursuant to provisions of the Docket No. 20099 Settlement Agreement. According to RCA Globcom the percentage increase in its annual charges under the proposed tariff varies from 49.9% for facilities obtained from AT&T Long Lines to 326.7% for facilities obtained from Pacific Telephone and Telegraph. *See* RCA Globcom Rejection Petition, pp. 7-8. RCA Globcom also alleges, because AT&T cross-references to interstate private line tariffs, the proposed rates are improper "intrastate" charges for international service.

the IRCs' charges to the public will have to be increased if the tariff filing becomes effective; and (e) that the tariff should not be allowed to become effective until such time as the Commission rules on the pending reconsideration requests before it and addresses in appropriate proceedings the outstanding questions of law and fact raised in those pleadings.[22]

30. Finally, WUI argues that the tariff filing should be rejected as being *prima facie* unlawful pursuant to: (a) the "prohibition" against *"ex parte"* contacts in *Home Box Office, Inc.* v. *FCC,* Case No. 75-1280 (D.C. Cir., March 25, 1977); (b) the Commission's Designation Order in Docket No. 20452 which classified the proceeding as a "restricted rulemaking proceeding" and stated that the Commission's Decision therein "will be based on matters submitted for or incorporated into the record"; and (c) Section 201(b) of the Act. In support of grounds (a) and (b) above WUI alleges "prejudgment" by the Commission and its staff. It alleges that although on several occasions the IRCs were denied conferences and hearings the Bureau staff held at least four *"ex parte* meetings" with AT&T on March 24, 1977, March 31, 1977, April 20, 1977 and May 18, 1977, subsequent to the Docket No. 20452 Decision but prior to the filing of the subject tariffs.[23] WUI contends that there must have been more contacts by AT&T with the staff than the

[22] *Supra,* n. 20.

[23] A detailed, 5-page summary of the matters discussed at these staff and AT&T meetings, and the details of another contact initiated on May 26, 1977, by Mr. Robert Conn, a Vice President of WUI, were provided to WUI pursuant to its Freedom of Information Act request of June 10, 1977. *See* June 24, 1977, letter from Philip V. Permut, Acting Deputy Chief, Common Carrier Bureau to Marc N. Epstein, Esq., counsel for WUI.

four reported by the Bureau (in particular, on the foreign transiting issue, see para. 11 above), that the four reported contacts were probably incomplete as to what occurred, that such contacts were prohibited in the context and background of Docket No. 20452, and that the Bureau's June 24, 1977 letter describing those contacts does not remove the "taint" on the outcome of any Commission determinations on AT&T's tariff filings, citing *Home Box Office, supra,* in support of its position.[24] WUI further claims, citing a Commission statement that it would consider pending reconsideration pleadings in light of any tariffs filed by AT&T, FCC 77-361 at para. 36, released June 9, 1977, that the AT&T tariff filing is an integral part of the restricted rulemaking proceeding in Docekt No. 20452. Thus, WUI claims any contacts by AT&T with the staff relating to the tariffs which were subsequently filed were subject to the *ex parte* rules, 47 CFR §§ 1.1200 *et seq.* WUI concludes that the failure of the staff and AT&T to follow the *ex parte* rules, which generally prohibit such contacts and require written public reports to the Executive Director if such contacts are made, calls in question the fairness of "this proceeding" and that only tariff rejection, coupled with appropriate evidentiary hearings, can remove the "taint."

31. WUI further requests rejection on the grounds that: (a) AT&T did not provide Section 61.38 cost support data to justify the filed rates; (b) AT&T improperly

[24] In *Home Box Office,* the D. C. Circuit Court of Appeals overturned the Commission's pay cable rules due to *ex parte* contacts with the Commission staff in a non-restricted rulemaking proceeding, which the Court determined to be a denial of due process. The *Home Box Office* decision has been appealed to the U.S. Supreme Court by the Commission. The Commission's petition for certiorari was recently denied by the Supreme Court.

cross-references "intrastate" private line rates into a "foreign" tariff offering; (c) such "intrastate" private line rates are higher than comparable interstate AT&T Long Lines charges; and (d) proposed tariff provision Section 2.1.4, which provides facilities will be available to IRCs only after provision has been made for exchange and MTS service, relegates IRC services to "second class" status. *See* WUI Petition for Rejection, pp. 8-10. WUI also asserts that IRCs would have to raise rates for their own services if the AT&T tariffs are effective and that, under such circumstances, a hearing and accounting order would not protect the IRCs against business losses on Mainland/Hawaii routes where AT&T is the main competitor.

32. WUI, RCA Globcom and ITT Worldcom also filed in the alternative petitions for suspension, investigation, and accounting orders. Since these petitions generally repeat arguments made in their rejection petitions, we see no need to summarize them.

33. AT&T opposes the IRCs' requests for tariff rejection, or in the alternative tariff suspension and investigation. It argues generally that its proposed tariffs comply with the Commission's Decision in Docket No. 20452 by eliminating the unjustified discrimination found to exist by the Commission in the way AT&T provided "like" facilities to the IRCs and the DSCCs and SCCs. In response to IRC allegations, AT&T contends that it is not required to file Section 61.38 cost justification for its proposed tariffs at this time. It alleges basically that the result of the Decision and AT&T's response thereto is that the provisions of the Settlement Agreement in Docket No. 20099, which was signed by AT&T, DSCCs, SCCs and the IRCs, govern the charges

applicable to all facilities offerings to OCCs, including the subject facilities. Such charges, AT&T contends, are negotiated interim rates which the signing parties, including the IRCs, agreed would be effective until cost justified rates replace them. AT&T also points out that this Agreement expressly permits cross-referencing to intrastate private line tariffs and to AT&T Tariff FCC No. 260 as a means to establish the basis for the OCC facilities charges challenged by the IRCs. In this connection, AT&T states that IRC allegations that AT&T is charging the IRCs improper "intrastate" private line rates is erroneous, because all OCC facilities rates are contained in interstate tariffs on file with the Commission. As noted above, AT&T states it will file full cost and other justification for OCC facilities rates on or before December 1, 1978. Further, to the extent the IRCs challenge the rates and rate structures of AT&T Tariff FCC No. 260 (see para. 29 above) which is cross-referenced by AT&T's OCC facilities Tariff FCC No. 266, AT&T argues that its Tariff No. 260 is already under investigation in Docket No. 20814, *MPL*, 59 FCC 2d 428 (1976). Thus, basically, AT&T contends that due to the Settlement Agreement in Docket No. 20099, other pending proceedings, and its plan to file cost justification for OCC facilities tariffs in the near future, it would be premature to require it now to file cost justification for the tariff filings in question. Therefore, it concludes that rejection, or suspension and investigation, on the ground that it did not file such justification, is unwarranted.[25]

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[25] AT&T also notes that it was granted a waiver of Sections 61.38 and 61.74 of the Rules by the Bureau with respect to the instant filing. We have considered on our own motion the Bureau's grant of AT&T's May 24, 1977 Application No. 8, request for

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34. AT&T further argues that other than an increase in facilities charges to IRCs "no essential change" in the manner in which the entrance and intercity facilities in question are presently provided to the IRCs under the general leasing contracts, *i.e.*, operating and technical arrangements, will result from its proposed tariff filing. Thus, AT&T indicates that it has retained such arrangements as meet International Telegraph and Telephone Consultative Committee (CCITT) standards. In response to RCA Globcom's allegation, described at para. 29 above, that AT&T, in violation of Section 214(a), 47 USC § 214(a), is terminating the availability of voice circuits in groups and supergroups to IRCs, AT&T argues that with the exception of group facilities used in connection with wide band data service and the 48 Khz facility referred to at para. 21 above, no IRC has ordered such facilities. Moreover, AT&T argues that its tariff filings will offer 50 and 56 kilobit data service for the IRCs. Thus, AT&T claims that the "effect" of its actions will be that no facility will be withdrawn from the IRCs as result of the termination of the general leasing contracts. RCA Globcom also alleges, para. 29 above, that AT&T's proposed tariffs do not provide for a "fixed loss" to insure high quality service. AT&T replies that the proposed tariffs provide for a "fixed level" which is equivalent to a "fixed loss," that its representatives have met with the IRCs to explain this, and that its engineering representatives are looking into RCA Globcom's further concerns about the kind of

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waiver, and find such grant consistent with our Docket No. 20452 Decision in that it facilitated the prompt elimination of the unjustified discrimination found therein. *See* para. 37 below. However, such a waiver does not preclude the Commission from investigating the reasonableness of the tariffs involved.

channel conditioning which will be provided to assure quality performance of facilities. RCA Globcom further alleges that AT&T has discontinued service, previously offered by contract, without Section 214(a) authority in that it does not provide for a temporary rate of less than one month in the proposed tariff filing. AT&T replies that a change in regulation which results in an increased rate, as is the case here, does not constitute an elimination of service within the meaning of Section 214 of the Act, citing *in the Manner* [*sic*] *of AT&T Long Lines Termination of Telpak*, FCC 77-384 at para. 11, released June 13, 1977. AT&T states that the one month service rate set forth in the proposed tariffs is common to the OCC facilities tariffs in general.

35. In response to the IRCs' requests for IRUs, AT&T argues that such matters are collateral to the issue of the proposed tariff filings and their compliance with Docket No. 20452. If the IRU question is to be addressed at all, it must be considered in a different forum with adequate notice and opportunity for comment by all interested parties, AT&T contends.[26] AT&T also responds to WUI's allegations that rejection or suspension is required because of *"ex parte"* contacts by AT&T with the Bureau staff. AT&T argues basically: (a) that the meetings with the staff occurred after Docket No. 20452 had been terminated and thus are not covered by the *ex parte* rules, *i.e.*, there was no proceeding instituted into the tariff filings at the

[26] We have held that Docket No. 20452 was not a proper forum to consider the broad policy issue of whether or not IRCs or any other carriers subject to our jurisdiction should be given IRUs in domestic facilities. *See, supra*, n. 4. Similarly, this AT&T tariff filing is not an appropriate forum to discuss such a broad policy issue.

time of the meetings; (b) that the meetings were held to insure adequate understanding of and compliance with the Decision and not to discuss the merits and outcome of Docket No. 20452; and (c) that, in any event, WUI has shown no prejudice from the meetings. In this latter respect AT&T states that a detailed summary of the meetings was provided to the IRCs by the Bureau, *supra,* n. 23, upon which WUI has had full opportunity to comment in its pleadings on AT&T's proposed tariffs. Despite this opportunity, AT&T states that WUI speculates that such summaries are inaccurate or incomplete. In this regard, AT&T argues that the Court's rationale in *Home Box Office, supra,* is not applicable here. It contends basically that WUI has had here precisely the opportunity the Court in that case found lacking—a statement of the alleged *ex parte* discussions and a full opportunity to comment. AT&T also cites the D. C. Circuit Court of Appeals July 1, 1977 decision in Case No. 74-2006, *Action for Children's Television* v. *FCC.* AT&T quotes that Court's language at p. 36 that "*ex parte* contacts do not per se vitiate agency informal rulemaking action, but only do so if it appears from the administrative record under review that they may have materially influenced the action ultimately taken." This is not the case here, AT&T claims. Finally, according to AT&T, the *Action for Children's Television* Court suggested at p. 36 that assertions such as WUI's, namely, that the Bureau's June 24, 1977, description of the alleged *ex parte* contacts is inaccurate or incomplete, do not warrant administration of a "lie-detector test." Thus, AT&T concludes that neither the facts or case law support a finding that WUI and other IRCs have been prejudiced by any meetings between AT&T and the Bureau staff. Accordingly, for the reasons given above, AT&T requests that we deny the IRCs' petitions for re-

jection, or suspension and investigation, of its proposed tariff filings.

36. We agree with AT&T that rejection of the proposed tariff filings is not appropriate here, and we generally concur in its responses to the IRCs' rejection and suspension petitions except to the extent indicated herein.[37] Rejection is not warranted under the circumstances pertaining here. The requirement for Section 61.38 data was properly waived by the Bureau because it permitted the prompt elimination of the unjustified discrimination found in Docket No. 20452. *See, supra,* n. 25. Moreover, as set forth below, there exist sufficient grounds to warrant investigation of AT&T's proposed tariffs in connection with an investigation of other OCC facilities tariffs. Although we are soon instituting an investigation we find neither suspension nor an accounting order with respect to AT&T's proposed tariffs is necessary. AT&T and the IRCs are fully capable of maintaining records of any facilities rate increases resulting from AT&T's implementation of our Docket 20452 Decision and the IRCs may later avail themselves of our complaint procedures, 47 USC § 208, in the event our investigation determines that they, and other OCCs, have been overcharged for "like" facilities by AT&T. Moreover, either rejection or suspension

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[37] Certain IRCs in their petitions against AT&T's proposed tariff filings cite statements made by AT&T in support of the contracts during the Docket No. 20452 hearing as reasons why AT&T's tariffs should be rejected or suspended and investigated. It is hardly surprising that in opposing rejection and suspension petitions AT&T takes positions contrary to the ones it stated in the Docket No. 20452 hearing. It seems obvious that at the time of the Docket No. 20452 hearing AT&T would be unlikely to admit to unlawfully discriminatory conduct. We note, however, that AT&T does not seek reconsideration of our findings in Docket No. 20452.

of AT&T's proposed tariffs would delay the elimination of the unjustified discrimination found in Docket No. 20452 (see below). If the IRCs should attempt to pass on such facilities rate increases to IRC ratepayers, we shall impose appropriate suspension and accounting orders with respect to any increases to IRC ratepayers to protect such ratepayers in the event our investigation later determines that AT&T has overcharged the IRCs and other OCCs for "like" facilities.

37. As noted previously, we found in our Docket No. 20452 Decision that the entrance and intercity facilities heretofore offered to the IRCs under general leasing contracts were "like" those facilities offered to DSCCs and SCCs under OCC facility tariffs at higher rates. Our Decision held that AT&T and the IRCs had not justified the *prima facie* discrimination in the IRCs' favor as required by Section 202(a) of the Act. See our discussion at paras. 7-25 above, where we affirm our Decision in this proceeding. Thus, to the extent that the IRCs' petitions for suspension and rejection continue to argue against our basic findings therein they are denied. AT&T has now filed proposed tariffs which it claims eliminate the unjustified discrimination which existed between AT&T's "like" facilities offerings. Although the proposed tariff applicable to entrance facilities, BOC Tariff FCC No. 4, appears to vary in some respects, *e.g.*, in applicable technical and operating arrangements, but not rates, from the tariffs governing entrance facilities for DSCCs and SCCs, the result of the tariff filing is that IRCs, DSCCs and SCCs will hereafter pay the same rates for essentially identical entrance and intercity facilities provided to them by AT&T.

For this reason, we find that to the extent that AT&T's chosen action eliminates an unjustified discrimination it substantially complies with our Decision.

38. In regard to the alleged differences in OCC and IRC facilities offerings, as noted at para. 14 above, services may still be "like services" within the meaning of Section 202(a) even if some differences exist.[28] Thus, to the extent that it appears that AT&T's proposed tariffs for IRC facilities differ in some minor respects from tariffs applicable to essentially identical facilities provided to DSCCs and SCCs we find such differences alone do not constitute non-compliance with our Decision, nor do they justify rejection or suspension of the proposed tariffs as requested by the IRCs. This is particularly true where the IRCs have failed to allege sufficient facts, demonstrating a reasonable likelihood of technical or other injury if the proposed tariffs become effective. Further, it appears that AT&T has adequately justified the retention of such minor differences in accordance with the flexibility we gave it in our Decision.[29] *See* 63 FCC 2d at 767,

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[28] It appears that neither AT&T nor the IRCs have identified any differences in the manner in which intercity facilities will be provided to IRCs vis-a-vis DSCCs and SCCs. Contrary to allegations by RCA Globcom we have not "prescribed" the tariffs to be filed by AT&T. We gave AT&T flexibility to exercise options of its own choosing and those options included the possible filing of tariffs. *See* our discussion at para. 5 above.

[29] While the use of a new tariff, BOC Tariff FCC No. 4, does not by itself constitute non-compliance with our Decision or justify rejection, we question the need for an entirely new tariff since the facilities provided to the IRCs are essentially identical to those provided the DSCCs and SCCs. It may have been more

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fn. 8. In this connection, see BOC Transmittal No. 5, p. 2, where AT&T explains the desirability of maintaining certain engineering and operating practices applicable to entrance facilities to conform with International Telegraph and Telephone Consultative Committee (CCITT) recommendations. Contrary to the allegations of the IRCs, particularly RCA Globcom, we believe AT&T has gone to great lengths to insure that the quality and utility of the facilities it will now provide under tariff to the IRCs will not be impaired. Based upon the steps AT&T has taken to meet the IRCs' concerns regarding assurance of quality facilities any possibility of injury to the IRCs in this respect is remote. Thus, it does not appear that AT&T is relegating IRCs to "second class" status as WUI alleges. Finally, we cannot find on the basis of the pleadings of the IRCs against AT&T's proposed tariffs that the retention of some differences makes the provision of facilities to the IRCs either more or less costly than AT&T's provision of similar facilities to DSCCs and SCCs such that different rate treatment for IRCs would be warranted.

39. In regard to the Section 214 issues raised by the IRCs, we essentially agree with AT&T's responses at para. 33 above to the IRCs' arguments. Further, as already noted, the IRCs have not alleged sufficient facts to reasonably show that the utility and quality of the facilities

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convenient in the time frame involved to file an entirely new tariff, but it appears to us that existing OCC facility tariffs could have been utilized almost entirely, or modified slightly, to accomplish AT&T's purposes. Whether or not a new tariff is necessary can be determined in the investigation we are initiating into the OCC facilities tariffs.

they will receive under tariff, rather than contract, constitute a withdrawal or impairment of service such that AT&T was required to obtain an appropriate Section 214 certificate. However, we do not agree, as AT&T seems to imply, that the mere fact a carrier has no orders for service, excuses it from the need to acquire Section 214 discontinuance authority.[30] Finally, we noted previously, *supra*, n. 14, some of the circumstances under which AT&T provides group and supergroup facilities to carriers other than the IRCs. AT&T is apparently unwilling to offer facilities on this basis to the IRCs under the proposed tariffs. While we find no Section 214 violation by AT&T for reasons already given, we expect AT&T to take steps to meet the IRCs' needs as it meets the needs of other carriers.

40. Although we find that AT&T has complied with our Decision in Docket No. 20452 to the extent it eliminates an unjustified discrimination, and therefore rejection, or suspension and hearing, is not justified on the basis it did not comply (see para. 37 above), we can neither approve or disapprove at this time the provisions of the tariffs AT&T has filed. For one thing, the rates contained in the various OCC facilities tariffs, including those filed herein for the facilities in issue, are the result of negotiations conducted in Docket No. 20099 and as interim rates have not been subject to full legal and procedural scrutiny by interested parties or the Commission. We shall therefore institute an investigation into the lawfulness of such OCC

[30] However, lack of demand is certainly a factor to be considered in connection with an application for discontinuance authority.

facilities tariff rates by separate order in the near future.[31] AT&T has indicated it plans to file cost and other justification for OCC facility tariffs, which would be applicable to the IRCs as well, on or before December 1, 1978. This filing, of course, would be useful in the proceeding we shall shortly designate. We realize that whether or not AT&T should file such justification sooner than the December 1, 1978 date is a question already pending before the Commission in connection with AT&T's request that certain requirements of our Docket No. 18128 Decision, namely, that all Bell service categories be targeted to earn a return of 9.5% on a revised FDC-7 basis, be waived for the "Other" category. *See* AT&T Long Lines letter dated August 1, 1977, and Docket No. 18128, *supra.* The "Other" category has been described by AT&T as including, *inter alia,* the OCC facilities tariffs and the facilities heretofore provided to IRCs under the general leasing contracts. We note, however, that we have never approved the December 1, 1978 date. Further, in light of the fact that we shall soon designate a proceeding we believe this date should be advanced. The Bureau, by letter dated October 4, 1977, is requesting AT&T to provide detailed information as to why the date cannot be advanced. Finally, certain IRCs claim they will be irreparably injured if AT&T's proposed tariffs become effective, due to an alleged need to increase their rates with a resultant reduction in their ability to compete with AT&T on Mainland/Hawaii routes (*see* para. 31 above). We note that a suspension or rejection of the AT&T tariff filing would only prolong the unjustified discrimination found to exist in Docket No. 20452. This we cannot accept. In any event, we are not convinced

[31] As noted previously, the Commission accepted the Docket No. 20099 settlement but never approved it.

that automatic rate increases for IRC services will result if the AT&T tariffs become effective.[32] The IRCs must justify any rate increases or decreases in accordance with our Rules and the statutory requirements of the Communications Act.

41. Some additional comments are warranted with respect to allegations by certain IRCs that there were prohibited *ex parte* contacts by AT&T with our staff and that such "contacts" have prejudiced the IRCs' rights with respect to the tariff filings at issue. At the outset, we believe the four meetings between AT&T and the Bureau staff challenged by certain of the IRCs did not fall within the scope of the Commission's *ex parte* rules, 47 CFR §§ 1.1201 *et seq.* The first three meetings, which were held subsequent to the Decision but prior to the date for filing reconsideration or clarification petitions, were for the purpose of assuring AT&T's understanding of and compliance with the Commission's Decision in Docket No. 20452. A reading of the Bureau's June 24, 1977, 5-page letter summarizing in detail these three meetings seems to make it clear that the merits and outcome of Docket No. 20452 were not to be the subject of discussion. The ground rules established for these three meetings assumed that the Commission's Decision was final and that compliance by AT&T was therefore required. At no time did the staff direct AT&T in the particular method of compliance but it merely listened to AT&T describe the voluntary actions it would

[32] We note that, despite the pendency of the subject AT&T tariff filings, the three IRCs serving Hawaii have filed substantial reductions in their private line rates between the Mainland and Hawaii. *See* ITT Worldcom Transmittal FCC No. 2033, RCA Globcom Transmittal FCC No. 4266 and WUI Transmittal FCC No. 1142.

take to comply with the Decision. AT&T correctly notes that no proceeding was pending with respect to the specific tariff matters discussed at these meetings. Further, as noted in the Bureau's letter, the staff spent much of its time listening to AT&T describe contractual situations, other than the IRC-AT&T general leasing contracts, to which AT&T thought the Commission's Decision did not apply. As noted in para. 24 above, in the near future we intend to initiate a proceeding to determine the treatment of those particular situations. Thus, the IRCs will have a formal opportunity to comment on these matters, which constituted much of the discussion in the meetings, in a subsequent proceeding. The fourth and briefest meeting, held shortly after petitions for reconsideration and clarification had been filed, was of a routine nature involving an AT&T application for waiver by the Bureau of certain procedural rules applicable to tariff filings. As noted previously, *supra,* n. 25, the Bureau's subsequent grant of this waiver request was proper because it permitted a tariff filing which expeditiously removed the unjustified discrimination found in Docket No. 20452.

42. However, assuming *arguendo* that one or more of the challenged meetings was improper under the *ex parte* rules, there has been no showing of prejudice to the IRCs' interests as a result of the holding of any of the meetings. A detailed description of the four meetings has been provided to the IRCs upon which they have had full opportunity to comment by letters (*e.g.,* RCA Globcom's July 18, 1977 letter), in their pleadings against AT&T's tariff filings (*e.g.,* WUI's petition for rejection), and in a September 7, 1977 public meeting held at the Commission's offices (see the Bureau's September 9, 1977 letter summarizing

this meeting). Moreover, as noted above, the IRCs will have a further opportunity to formally comment on subject matter which constituted a substantial portion of the discussion held in the meetings. Further, the IRCs have had full opportunity herein to challenge the tariffs filed by AT&T even if such tariffs were the subject of one or more inappropriate meetings. Also, the IRCs will have a further opportunity to challenge these tariffs and rates, contained therein in the investigation we are shortly designating.[33] Under these circumstances, the IRCs' allegations that they have been prejudiced and their speculative allegations that the Bureau's June 24, 1977 letter describing the meetings was inaccurate or that other meetings were held but not reported, cannot be held to have any significant relevance to the issues before us. The Bureau in its June 24 letter acknowledges that the summary of the meetings was based on individual recollections of the staff participants. That being the case, there is no way we can determine beyond any doubt the accuracy or completeness of the information provided on these meetings. Ultimately, however, it would seem that any items discussed at these meetings which were not subject to staff recollection can hardly be said to be a factor in influencing the Commission's decision-making process. Also, we agree with AT&T's analysis of the D.C. Court of Appeal's *Home Box Office* and *Action for Children's Television* decisions as they may bear on this matter. As indicated in AT&T's analysis of these

[33] Of course, our basic Docket No. 20452 findings that the contract facilities provided to the IRCs are "like" those tariff facilities provided to the DSCCs and SCCs, and that AT&T and the IRCs have not justified the rate preference given the IRCs, are not subject to further challenge in such investigation. Nor will the question of alleged improper *ex parte* contacts and other issues disposed of herein be issues for investigation.

cases, under any reasonable reading of the facts herein, the IRCs have been afforded a full opportunity to comment on any alleged *ex parte* meetings and thus have not been prejudiced.

43. In summary, we have a voluminous administrative record before us: the Docket No. 20452 record and Decision; the IRCs' petitions for reconsideration of such Decision; the IRCs' petitions against AT&T's proposed tariffs implementing the Docket No. 20452 Decision; all other miscellaneous letters and comments filed by the IRCs herein; AT&T's tariffs and transmittal letters; AT&T's responsive pleading to IRC petitions to reject or suspend; the Bureau's June 24, 1977, 5-page letter describing in detail the meetings held with AT&T; and the Bureau's summary of the September 7, 1977 public meeting. Based upon this record, and relying on our own expertise in determining the findings and conclusions to be drawn from the underlying facts of record,[34] we find that the IRCs have had more than one opportunity to present their position on all matters concerning Docket No. 20452 and the implementation of the Decision therein by AT&T.

44. Accordingly, IT IS ORDERED, That the petitions for reconsideration of our Decision in Docket No. 20452, filed by ITT Worldcom, RCA Globcom and WUI, ARE DENIED, and that AT&T's petition for clarification IS GRANTED to the extent indicated herein;

45. IT IS FURTHER ORDERED, That the petitions to reject AT&T's proposed tariffs, transmitted under Transmittal

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[34] See Docket No. 19989, *WATS*, 59 FCC 2d 671, 681, fn. 17 (1976).

Nos. 5 and 12758, respectively, filed by ITT Worldcom, RCA Globcom, TRT and WUI ARE DENIED;

46. IT IS FURTHER ORDERED, That the petitions to suspend and investigate AT&T's proposed tariffs, transmitted under Transmittal Nos. 5 and 12758, respectively, filed by ITT Worldcom, RCA Globcom and WUI ARE GRANTED to the extent indicated herein and OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Acting Secretary

Appendix E, December 1977 Memorandum Opinion and Order of the Federal Communications Commission.

[Form of Order Attached to FCC Answering Brief in the Second Circuit]

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of	)	
	)	
American Telephone and Telegraph	)	Docket No.
Company and Asscciated Bell System	)	
Companies, Offer of Facilities for	)	
Use by Other Common Carriers	)	

Memorandum Opinion and Order

Adopted: December 30, 1977; Released:

By the Commission:

1. In our Memorandum Opinion and Order released October 25, 1977, in Docket No. 20452, *AT&T Interconnection Facilities for International Record Carriers (IRCs)*, FCC 77-694, we stated that we would soon institute an investigation into the lawfulness of American Telephone and Telegraph Company's (AT&T) and the Associated Bell System Companies' facilities offerings to other common carriers (OCCs). *See* FCC 77-694 at para. 40. We here set for investigation these OCC facilities tariff offerings. The specific tariffs which shall be included for investigation, and any revisions thereto, are set forth in the Appendix hereto.

2. Basically this investigation will focus on the lawfulness under Sections 201(b) and 202(a) of the Act, 47 USC

§§ 201(b) and 202(a), of the charges and other provisions contained in the OCC facilities tariffs. Thus, AT&T and its associated companies will have the burden of proving among other things, that the OCC facilities tariff are just and reasonable and that any discrimination or preferences given under the tariffs between and among different classes of carriers for like facilities are reasonable. Also, any carrier claiming it is entitled to a rate or other preference vis-a-vis other carriers under the tariffs will be given the opportunity in the investigation to show that such preferences are justified by cost differences or other justification.[1] We shall set forth specific issues and procedures by separate order in the near future. As an aid to determining what specific issues and procedures shall govern this proceeding, and to determine what other proceedings, if any, may be necessary, we are requesting comments and reply comments from interested parties suggesting possible issues and procedures. Particularly, we request comments on the manner in which issues arising from Docket 18128 implementation should be considered. Also, we note that AT&T and its Associated Companies have stated plans to file cost justification for the OCC facilities tariffs no later than December 1, 1978. Comments are requested as to the manner in which an investigation should include this proposed filing for consideration, *e.g.*, whether all or part of this proposed justification can be filed at an earlier date, and if not, how the hearing should be organized so that it can proceed in the most expeditious and efficient manner.

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[1] In this regard, the statement in our Docket 20452 action, *supra* at para. 42, fn. 33, to the effect that the IRCs could not seek to justify any rate preferences between the like facilities involved was not meant to preclude them from showing in this proceeding that cost differences justify a rate differential.

Appendix E, December 1977 Memorandum Opinion and Order of the Federal Communications Commission.

3. Accordingly, it is ORDERED, That, pursuant to Section 4(i), 4(j), 201-205, and 403 of the Communications Act, 47 USC §§ 154(i), 154(j), 201-205, and 403, an investigation and hearing is hereby instituted into the lawfulness of the above referenced AT&T and Bell System Associated Companies facilities tariffs;

4. IT IS FURTHER ORDERED, That, specific issues and procedures to govern this investigation shall be set forth by further Commission order;

5. IT IS FURTHER ORDERED, That AT&T and the Bell System Associated Companies are HEREBY NAMED PARTIES RESPONDENT herein;

6. IT IS FURTHER ORDERED, That interested parties shall file comments suggesting issues and procedures for the investigation(s) on or before January 25, 1978 and reply comments shall be filed on or before February 15, 1978.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Acting Secretary

Appendix E, December 1977 Memorandum Opinion and Order of the Federal Communications Commission.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
American Telephone and Telegraph	)	Docket No. 21499
Company and Associated Bell System	)	
Companies, Offer of Facilities for	)	
Use by Other Common Carriers	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 30, 1977; Released: December 7, 1977

By the Commission:

Commissioner Brown not participating.

1. In our Memorandum Opinion and Order released October 25, 1977, in Docket No. 20452, *AT&T Interconnection Facilities for International Record Carriers (IRCs)*, FCC 77-694, we stated that we would soon institute an investigation into the lawfulness of American Telephone and Telegraph Company's (AT&T) and the Associated Bell System Companies' facilities offerings to other common carriers (OCCs). *See* FCC 77-694 at para. 40. We here set for investigation these OCC facilities tariff offerings. The specific tariffs which shall be included for investigation, and any revisions thereto, are set forth in the Appendix hereto.

2. Basically this investigation will focus on the lawfulness under Sections 201(b) and 202(a) of the Act, 47 USC §§ 201(b) and 202(a), of the charges and other provisions

contained in the OCC facilities tariffs. Thus, AT&T and its associated companies will have the burden of proving among other things, that the OCC facilities tariffs are just and reasonable and that any discrimination or preferences given under the tariffs between and among different classes of carriers for like facilities are reasonable. Also, any carrier claiming it is entitled to a rate or other preference vis-ɿ-vis other carriers under the tariffs will be given the opportunity in the investigation to show that such preferences are justified by cost differences or other justification.[1] We shall set forth specific issues and procedures by separate order in the near future. As an aid to determining what specific issues and procedures shall govern this proceeding, and to determine what other proceedings, if any, may be necessary, we are requesting comments and reply comments from interested parties suggesting possible issues and procedures. Particularly, we request comments on the manner in which issues arising from Docket 18128 implementation should be considered. Also, we note that AT&T and its Associated Companies have stated plans to file cost justification for the OCC facilities tariffs no later than December 1, 1978. Comments are requested as to the manner in which an investigation should include this proposed filing for consideration, *e.g.*, whether all or part of this proposed justification can be filed at an earlier date, and if not, how the hearing should be organized so that it can proceed in the most expeditious and efficient manner.

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[1] In this regard, the statement in our Docket 20452 action, *supra* at para. 42, fn. 33, to the effect that the IRCs could not seek to justify any rate preferences between the like facilities involved on grounds other than costs was not meant to preclude them from showing in this proceeding that cost differences justify a rate differential.

3. Accordingly, it is ORDERED, That, pursuant to Section 4(i), 4(j), 201-205, and 403 of the Communications Act, 47 USC §§ 154(i), 154(j), 201-205, and 403, an investigation and hearing is hereby instituted into the lawfulness of the AT&T and Bell System Associated Companies facilities tariffs attached hereto as an appendix:

4. IT IS FURTHER ORDERED, That, specific issues and procedures to govern this investigation shall be set forth by further Commission order;

5. IT IS FURTHER ORDERED, That AT&T and the Bell System Associated Companies are HEREBY NAMED PARTIES RESPONDENT herein;

6. IT IS FURTHER ORDERED, That interested parties shall file comments suggesting issues and procedures for the investigation(s) on or before January 25, 1978 and reply comments shall be filed on or before February 15, 1978.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Acting Secretary

Appendix F, Opinion, United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 564, 565, 566—September Term, 1977.

(Argued December 7, 1977 Decided December 21, 1977.)

Docket Nos. 77-4183, 77-4184, 77-4191

WESTERN UNION INTERNATIONAL, INC., RCA GLOBAL COMMUNICATIONS, INC., and ITT WORLD COMMUNICATIONS INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondents,

and

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and TRT TELECOMMUNICATIONS CORPORATION,

Intervenors.

Before:

KAUFMAN, *Chief Judge,*
MESKILL, *Circuit Judge,* and BARTELS, *District Judge.**

Petition for review of Decision and Orders of the Federal Communications Commission, requiring the American

* Of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix F, Opinion, United States Court of Appeals for the Second Circuit.

Telephone and Telegraph Company to eliminate a discrimination by which it charged the international record carriers lower rates under contracts than it charged for "like" services provided to other common carriers under tariff.

Denied.

ALVIN K. HELLERSTEIN, New York, New York (Alan Kolod and Stroock & Stroock & Lavan, of counsel; Robert E. Conn, Marc N. Epstein of Western Union International, Inc., New York, N.Y., of counsel), *for Petitioner Western Union International, Inc.*

H. RICHARD SCHUMACHER, New York, New York (John A. Shutkin and Cahill Gordon & Reindel, of counsel; Frances J. DeRosa, Charles M. Lehrhaupt of RCA Global Communications, Inc., New York, N.Y., of counsel), *for Petitioner RCA Global Communications, Inc.*

GRANT S. LEWIS, New York, New York (John S. Kinzey and LeBoeuf, Lamb, Leiby & MacRae, of counsel; Howard A. White, Joseph J. Jacobs, Randall B. Lowe of ITT World Communications Inc., New York, N.Y., of counsel), *for Petitioner ITT World Communications Inc.*

JACK DAVID SMITH, Washington, D.C. (Federal Communications Commission, Robert R. Bruce, General Counsel, Daniel M. Armstrong, Associate General Counsel; and U.S. Department of Justice, Washington, D.C., John H. Shenfield, Assistant Attorney

General, Barry Grossman, Andrea Limmer, Attorneys, of counsel), *for Respondents Federal Communications Commission and United States of America.*

James S. Golden, Bedminster, New Jersey (Edgar Mayfield, Robert E. Boone, Bedminster, New Jersey, and Alfred C. Patroll, Gerald E. Murray, New York, N.Y., of counsel), *for Respondent-Intervenor American Telephone and Telegraph Company.*

Roderick A. Mette, Washington, D.C., *for Intervenor TRT Telecommunications Corporation.*

Kaufman, *Chief Judge:*

Just over a century ago, Alexander Graham Bell marked the beginning of a new era with the invention of the telephone. Little did he know that successive generations would treat his "creation" as but the simplest building block in a communications system of extraordinary complexity. We are asked, on this appeal, to unravel some of these intricacies in applying the mandate of §202(a) of the Communications Act that there be no unjust discrimination in the rates charged for "like" communications services. Several international record carriers ("IRCs"), namely companies carrying messages overseas, petition for review of the Federal Communications Commission's ("FCC") determination that the facilities they lease from the American Telephone and Telegraph Company ("AT &T") are "like" those used by specialized domestic carriers. Pursuant to its finding of likeness, the FCC ordered AT&T to eliminate the existing disparity in rates governing the domestic and international carriers. As a result,

AT&T filed tariffs raising the charges paid by the IRCs to parity with the cost to the domestics. We find the FCC's decision to be fully supported by substantial evidence in the record and, accordingly, deny the petition.

I.

To fully understand the factual and legal questions presented by this appeal, a familiarity with the position and function of licensed communications carriers is essential. The facts, which at first blush seem to require the expertise of a DeForest or a Kettering, can upon reflection be readily disentangled.

The International Record Carriers. Petitioners Western Union International, Inc. ("WUI"), RCA Global Communications, Inc. ("RCA"), ITT World Communications Inc. ("ITT"), and intervenor TRT Telecommunications Corp. ("TRT") are international record carriers. As such, they are empowered by the FCC to provide communications services[1] between the United States and points overseas. Pursuant to their licenses, the IRCs are permitted to transmit and receive messages from and between five so-called "gateway cities."[2] The services of the IRCs cannot extend beyond this rather limited network.

The operating procedure of the IRCs is relatively uncomplicated. Once a message is received in a gateway city, it is then transmitted overseas either through the medium of submarine cables or international satellites. The cables are jointly owned and operated by the IRCs, AT&T, and various foreign governments; the satellites are owned by INTELSTAT, an international consortium from whose

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1 The IRCs provide telex, telegrams, facsimile, data transmissions, private lines for alternate voice-data traffic and other record-communications services of a sophisticated nature.

2 New York, San Francisco, Washington, Miami, and New Orleans.

American representative the IRCs merely lease "space". To link up to a cable or satellite system, however, the message must first be transmitted to, respectively, "cable heads" or "earth stations". These terminals are jointly owned and used by AT&T and the IRCs.

The IRCs thus have an ownership interest in many of the international transmission facilities. Yet, they are completely dependent on the circuits owned by AT&T which connect one gateway operating center to another ("intercity facilities") and which join each of the five centers to cable heads and earth stations ("entrance facilities"). Pursuant to private contractual agreements, the IRCs lease these "interconnection facilities" from AT&T.[3]

The Domestics. Recently, the FCC has encouraged the entry of new carriers into the domestic communications field. In the early 1970's the Commission began licensing various Domestic Satellite Common Carriers ("DSCCs") and Specialized Common Carriers ("SCCs") to offer, in competition with AT&T, private line service[4] to governmental and large private commercial users. *See, e.g., Specialized Common Carrier Services,* 29 F.C.C.2d 870 (1971); *Domestic Communications Satellite Facilities,* 35 F.C.C.2d 844 (1972).

In spite of their competitive position vis-à-vis AT&T. the so-called "domestics" often found it necessary to use that company's landline interconnection facilities. They soon discovered, however, that AT&T was restricting their

3 The IRCs are not pleased with this arrangement, and have, for almost a decade, sought to purchase an ownership interest, known as an indefeasible right of use ("IRU"), from AT&T. The FCC, however, has refused to order AT&T to relinquish its control over the circuits.

4 "Private line service" provides the large-scale telephone customer with full-time private circuits for the transmission of communications between specified locations. This offers the customer continuous communication without requiring the carrier to establish a new connection for each call or message.

access to its circuits and was charging discriminatory rates for the provision of services. In 1974, after receiving numerous complaints, the FCC ordered AT&T to provide the domestics with interconnection facilities and to promulgate standardized charges. *Bell System Tariff Offerings,* 46 F.C.C.2d 413 (1974), *aff'd sub nom. Bell Telephone Co. of Pennsylvania* v. *FCC,* 503 F. 2d 1250 (3d Cir.), *cert. denied,* 422 U.S. 1026 (1975). AT&T subsequently filed tariffs governing the use of interconnection facilities, and the FCC indicated that it would study the propriety of these rates in light of the widespread concern among the domestics over them. *AT&T Offer of Facilities for Use by Other Common Carriers,* 47 F.C.C.2d 660 (1974). To obviate the need for a full-scale FCC investigation, the FCC and AT&T agreed that AT&T would attempt to settle its differences with the various carriers through negotiation. Because some of the proposed tariffs would have affected aspects of the IRC operation,[5] the international carriers also participated in these discussions.

In due course, a "Settlement Agreement" between the parties was reached, and they requested the FCC to accept their resolution of the dispute. While the Settlement Agreement applied to all of the interconnection facilities used by the domestics, it explicitly excluded from its scope those used by the IRCs, and justified that limitation by reference to the alleged "unique needs" of the international communications network. This exclusion was made at the insistence of the IRCs, presumably because the then existing contractual rates were lower than the rates proposed in the Settlement Agreement.

The FCC Investigation. Because the terms embodied by the Settlement Agreement would lower the rates paid by

5 At issue was a New York Telephone tariff involving certain telegraph grade facilities made available to the IRCs. *See ITT World Communications Inc.* v. *New York Telephone Co.,* 381 F. Supp. 113 (S.D.N.Y. 1974).

the domestics for the use of AT&T's facilities and were, accordingly, in the public interest, the FCC accepted the accord on May 7, 1975 "without necessarily approving it." *AT&T Offer of Facilities for Use by Other Common Carriers,* 52 F.C.C.2d 727 (1975). The Commission did, however, take issue with the Agreement's representation that the IRC facilities were unique:

> The Settlement Agreement points out, however, that, notwithstanding the furnishing of similar facilities to other common carriers pursuant to tariffs, entrance and intercity facilities furnished by AT&T to the IRCs continue to be furnished pursuant to contract. In apparent support, the parties noted "the unique needs of the [IRCs] between gateway cities and for entrance channels from cable heads and earth stations to those carriers' central offices in metropolitan areas." We still believe that a substantial question exists as to whether we should order AT&T to provide these facilities pursuant to filed tariffs rather than pursant to contracts, and we will take appropriate action on this matter in a separate order.

52 F.C.C.2d at 735.

Carrying out its stated purpose to investigate whether the interconnection facilities should be governed by tariff, the FCC, pursuant to a "separate order" issued that same day, established a restricted rule-making proceeding, 47 C.F.R. §1.1201. *Interconnection Facilities Provided to the International Record Carriers,* 52 F.C.C.2d 1014 (1975). The Commission left no doubt that the motivation behind the inquiry was the alleged disparate treatment of the IRCs and the domestic carriers:

> It appears to us that there is no significant difference between the interconnection facilities provided to the

> IRCs and those provided under tariff to the specialized common carriers including domestic satellite common carriers.

52 F.C.C.2d at 1014.

The IRCs and AT&T[6] filed comments in connection with the rule-making proceeding. They uniformly stressed the fact that the existing contractual arrangement was satisfactory, and several expressed doubts about the FCC's authority to abridge contracts between carriers. None of those commenting referred to any explicit differences in physical facilities, functions, or costs of the two systems. The only "distinction" raised by the IRCs was their tautological assertion that the facilities used by them were "part" of an international communications network, and therefore distinguishable from the "domestic" circuits employed by the domestic carriers. RCA characterized this fact as a difference "between the circumstances" under which the two sets of companies obtained interconnection facilities.[7] WUI, seeking to appear more specific, noted that the "subject contracts are an inherent part of the longstanding submarine cable and satellite earth station consortia of the IRCs and AT&T, totally distinct from the domestic telecommunications industry." ITT similarly described the facilities as "nothing more nor less than U.S. extensions of [the] overseas cables."

On March 23, 1977, the Commission issued its order. It found that the facilities provided to the IRCs were "essentially identical" to those provided to the domestics and that the disparate rate structure was accordingly

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6 While AT&T noted that the existing arrangement appeared satisfactory, it also expressed its willingness to file tariffs if the FCC found it to be in the public interest.

7 A similar comment was voiced by TRT, which noted that the two sets of facilities were supplied "under significantly different circumstances."

discriminatory under §202(a) of the Communications Act. *Interconnection Facilities Provided to the International Record Carriers*, 63 F.C.C.2d 761 (1977). In its decision, the Commission expressed particular concern that the difference in the rate structures for the two systems might well have resulted in the subsidization by domestic customers of the international communications network. The Commission thus ordered AT&T to eliminate this disparity by filing appropriate tariffs, although it explicitly noted that it was expressing "no opinion" with regard to how AT&T might wish to do so. The FCC did comment, however, that if AT&T offered its facilities to all carriers—domestic and international—on identical terms, then the requirement of 47 C.F.R. §61.38, that rates be justified by underlying costs, would be waived.

The IRCs immediately moved for reconsideration of the FCC decision. While their petitions were pending, AT&T sought clarification of its obligation under the order. In particular, the company was having difficulty devising a nondiscriminatory tariff to cover several peculiar communications "systems" aptly characterized by the FCC as "quirks". These included the Washington to Moscow "Hotline", a Florida-Cuba cable circuit serving foreign diplomats in Havana, the Department of Defense's AUTOVON network, and a facility used by the National Aeronautics and Space Administration for the tracking and monitoring of space satellites. In an effort to resolve these difficulties, four meetings were held in the spring of 1977 between AT&T and the FCC. The merits of the FCC order were never discussed. Approximately one month after the last of these meetings, the Commission supplied all interested parties with a summary of the discussions that took place.

On May 26, AT&T filed tariffs for the IRC interconnection circuits, choosing to eliminate the discrimination

by raising the rates charged the IRCs to parity with those charged the domestics. Initially, this new cost schedule was to become effective in late August but was subsequently deferred to October 28. This delay permitted the FCC to hold a public meeting on September 7 to settle some of the outstanding issues affecting the tariffs. At that gathering an AT&T representative, responding to IRC comments that the tariffs should reflect cost differences between the IRC and domestic facilities, noted that "[e]ntrance and transiting facilities [for IRC's] are physically and essentially the same as those provided to domestic[s]. We cannot justify a lower charge to the IRC's."[8]

The difficulties between the IRCs and AT&T remained unresolved following the meeting and, on October 25, 1977, the FCC filed its order denying the still pending application for reconsideration of its earlier decision. *Interconnection Facilities Provided to the International Record Carriers*, FCC 77-694 (Reconsideration Order). The Commission based its determination not only on the initial comments provided by the IRCs, but also on their submissions supporting the request for reconsideration. The FCC, in examining this "voluminous administrative record",[9] found little that would alter its earlier conclusions. In submitting their petition for reconsideration, the IRCs had made several specific claims of differences between the two systems. They had noted special geographical limitations on the locations of gateway cities, earth stations and

8 Minutes, dated September 9, 1977, of public meeting held at FCC offices on September 7.

9 The FCC noted that it had before it: its original decision and the accompanying record; the IRCs' petitions for reconsideration of that decision; the IRCs' petitions against AT&T's proposed tariffs; all other miscellaneous letters and comments filed by the IRCs; AT&T's responsive pleading to the IRC petitions to reject the tariffs; the summary of the meetings between the FCC and AT&T; and the summary of the September 7, 1977 public meeting. Reconsideration Order, ¶43.

cable heads, and further observed that the IRC circuits were engineered to meet special international operating requirements. In a lengthy opinion, the FCC rejected each of these contentions. It noted, for example, that geographic limitations have never been deemed sufficient as a distinguishing factor, for if it were, virtually any local service would become "unique". Regarding the international operating requirements the Commission observed that many domestic circuits were engineered to meet such specifications, and, in any event, the alleged differences were not substantial enough to make the two types of services "unlike".[10]

While the IRCs protested that the finding of "likeness" was based on an inadequate record, and demanded an evidentiary hearing, the Commission felt that nothing would be gained by extending an already exhaustive investigation.

II.

The petitioners attempt to gloss over the language of §202(a) of the Communications Act, 47 U.S.C. §202(a), which forbids "unjust or unreasonable discrimination in charges" in connection with the provision of "like" communication services. By its terms, the statute embodies an absolute obligation to prevent such discrimination in the public interest regardless of the needs of particular users or other policy considerations. *American Trucking Associations, Inc.* v. *FCC*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967). The issue before us

10 In the reconsideration order, the FCC also examined the tariff filed by AT&T, noting that the IRCs had failed to demonstrate why the tariff should be rejected or suspended. The Commission found that its waiver of cost justification for the tariff was appropriate, since absent a waiver, the discrimination might well have continued while cost figures were developed. *See National Association of Motor Bus Owners* v. *FCC*, 460 F.2d 561, 568 (2d Cir. 1972).

simply is whether the FCC's finding of "likeness" with regard to the domestic and IRC facilities is supported by substantial evidence. We have no difficulty in finding that it is.

In May 1975, when the FCC first commenced its rulemaking proceeding, it noted that there were no "significant differences" between the domestic and IRC interconnection facilities. In fact, this similarity was readily apparent from tariff and contractual provisions governing, respectively, domestic and international communications. The facilities for both employed "voice-grade" circuits possessing similar bandwidths. They performed essentially the same functions:[11] the entrance facilities interconnected either earth stations,[12] microwave terminals, or cable heads to operating offices, while the intercity facilities in both instances permitted communications between and among operating offices in different cities. Given this functional similarity, the FCC had good cause to suspect that there was little justification for the large difference in the rates charged for the two facilities.

In the ensuing two years—while the FCC came to a final decision and studied the requests for reconsideration

11 "Functional similarity" has been used in the past as a criterion for determining likeness for section 202(a) purposes. *See, e.g., American Trucking Associations, Inc.* v. *FCC*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967); *Investigation into the Lawfulness of Tariff FCC No. 267, Offering a Dataphone Digital Service Between Five Cities*, 62 F.C.C. 2d 774, 796-97 (1977). The Commission has always made "likeness" determinations on a case-by-case basis, although it indicates that it will soon attempt to develop general standards. Reconsideration Order, ¶12 n. 11.

12 The IRCs argue that the domestic carriers "normally" use their own microwave circuits to link their operating centers to earth stations. Whether or not that is the case—for no evidence is given in support of that claim—some domestics do use AT&T entrance facilities, as is clearly demonstrated by the Settlement Agreement. *AT&T Offer of Facilities for Use by Other Common Carriers*, 52 F.C.C. 2d 727, 727-28 (1975).

—the IRCs were given and took advantage of numerous opportunities to distinguish the two sets of circuits. Their arguments rested on the facile and conclusory observation that the IRC interconnections were "part" of the international system, and thus "unique," although some went so far as to acknowledge that the two sets of facilities, in terms of their physical and functional characteristics, might well be similar.[13] Throughout the entire period, no significant differences between the two systems came to light. In fact, AT&T, which built and operates both systems, observed that the facilities are "physically and essentially the same." [14]

We fail to see what additional facts would have been elicited in hearings given that these proceedings have already become unduly extended with repeated opportunities to supply information and air the problem. Admittedly, there has been no evidentiary hearing. The type of hearing required however, must depend on the circumstances of each case. *RCA Global Communications, Inc.* v. *FCC*, 559 F.2d 881 (2d Cir. 1977). The IRCs have failed to demonstrate that the extensive notice and comment procedures afforded them did not provide ample opportunity to explore the alleged unique characteristics of the IRC interconnection circuits.

Our determination is buttressed by the fact that once the FCC demonstrated a basis for its determination of likeness, the burden shifted to the IRCs to disprove the discrimination in its favor. *See Trailways of New England, Inc.* v. *CAB*, 412 F.2d 926, 932 n.13 (1st Cir. 1969). Afforded the chance on repeated occasions, they have

13 RCA noted, for example, that "in some cases there may well be no significant difference between [domestic] facilities generally and IRC facilities."

14 Minutes, *supra* note 8.

failed to do so. In fact, they have to this day made only one argument to justify the discrimination: a difference in the costs of the two systems. Since that issue was never raised in the proceedings before the Commission, however, it cannot be brought up at this juncture of the case for the first time.[15] *Gross* v. *FCC*, 480 F.2d 1288, 1290-91 n.5 (2d Cir. 1973). Moreover, the limited evidence on this issue—the statement of the AT&T representative at the September 7, 1977 meeting—suggests the absence of any disparities in this regard.

In any event, the FCC is about to conduct a hearing into the cost justification for the tariff rates proposed under the Settlement Agreement, and the IRCs will be able to participate fully in that inquiry. Should there be a finding that those rates are unduly high, the IRCs would be able to recover overcharges plus interest. 47 U.S.C. §§208-09. Any cost differences between the two systems would hopefully also be brought to light in these hearings.

III.

The petitioners also charge that the FCC proceedings were irreparably tainted by four *ex parte* meetings that took place between officials of the Commission and AT&T representatives for the purpose of discussing the so-called "quirks", to which we have previously referred. They argue that the FCC investigation was designated as a "restricted rule-making proceeding", and under the Commission's own rules, FCC personnel were prohibited from entertaining *ex parte* presentations. 47 C.F.R. §1.1225(b). We find, however, that these meetings were not prohibited

15 The IRCs raised the issue of cost differences only in connection with the validity of the tariff filed by AT&T, which of course involves a question that is plainly separable from the finding of likeness. And concerning the tariff, the Commission properly decided to waive cost justification so as to move expeditiously in eliminating the discrimination.

under the FCC rules, for the AT&T representatives' involvement did not constitute "presentations". As defined in 47 C.F.R. §1.1201(f), "presentations" are only "communication[s] going to the merits or outcome of any aspect of a restricted proceeding." 47 C.F.R. §1.1201(f). The discussions with AT&T were intended solely to help that company implement the FCC order in specific, troublesome areas. Nothing said in these meetings was intended to affect the order itself in any manner, or to influence the Commission regarding the petition for reconsideration. Indeed, on the one occasion when AT&T raised the issue of possible cost differences between the IRC and domestic circuits, an FCC official cautioned that the subject could not be discussed, and that AT&T should file a petition for reconsideration if it wished to challenge the order itself.

In any event, little prejudice to the IRCs, if any, could have arisen from the meetings. The scope of discussion was confined to several minor idiosyncracies in the international circuits, affecting in no way the great bulk of the circuits covered by the FCC's order. In addition, the IRCs have been in possession of a summary of the meetings since June 24, 1977, and were explicitly invited to comment on this matter by the FCC.[16] Under these circumstances, the claim of prejudice to the IRCs is totally without merit. *Compare Home Box Office, Inc.* v. *FCC*, No. 75-1280, slip. op. (D.C. Cir. March 25, 1977), *cert. denied*, 46 U.S.L.W. 3190 (October 3, 1977).

IV.

Finally, the IRCs attempt to characterize the FCC's order as one that "abrogates" the private contractual

16 RCA was the only IRC to respond directly to the FCC request. WUI also commented on the *ex parte* meetings, but did so only in a petition to reject the AT&T tariff. It contended that the meetings "exacerbated" the FCC's alleged preconceptions regarding the merits of this controversy.

agreements existing between them and AT&T and, as such, goes beyond the Commission's statutory authority. Admittedly, the Commission does not have any express authority to countermand intercarrier contractual agreements. *See Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975). And while the Commission contends that this power should be implied from the statutory framework, to do so would require a finding that the proposed action is in the public interest. 63 F.C.C. 2d at 765-66. That finding is absent here.

Whatever the precise scope of the FCC's power, it is evident that the Commission has not abrogated any intercarrier contracts. Nothing in its order required that AT&T alter the rates it charged the IRCs. To the contrary, the order explicitly noted that it was merely requiring AT&T to eliminate the discrimination between the domestic and IRC circuits. It was thus open to AT&T to alter the rates it was charging the domestics by bringing them down to the fee levels charged in the IRC contracts. The FCC order further specified that so long as the rates for the two systems were equalized—by whatever means—the Commission would not require cost justification. Petitioners' contention that AT&T was forced to raise the IRC rates due to a lack of cost figures is therefore incorrect.[17]

17 Comments by two of the petitioners indicate that the choice offered AT&T was a real one. During the September 7 meeting between AT&T and the IRCs, RCA Vice-President Asher H. Ende noted that "[i]n Docket 20452 [the] FCC did not require filing of this new tariff, but only that AT&T eliminate unlawful discrimination . . . . The Commission left room for a compromise." And an attorney for WUI, Marc N. Epstein, noted in a letter to AT&T dated September 26, 1977, that "the Commission did not explicitly require the exact tariffs AT&T filed. It required only the elimination of an alleged unlawful discrimination. Therefore, the [FCC] Staff took the position that there may be room to compromise or narrow the issues. In light of the foregoing, AT&T's

Appendix F, Opinion, United States Court of Appeals for the Second Circuit.

As must be obvious to the interested parties, we have carefully reviewed this substantial record. We find no merit in any of the IRCs' other contentions and therefore deny the petition.

attempts to place the onus of its unwillingness to discuss settlement upon the Commission is misplaced."

Appendix G, Orders on Motions to Stay.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of December, one thousand nine hundred and seventy-seven.

Western Union International, Inc.,
Petitioner
v.
The Federal Communications Commission, et al.,
Respondents

RCA Global Communications, Inc., TRT Telecommunications Corporation,
Intervenor

RCA Global Communications, Inc.,
Petitioner
v.
Federal Communications Commission, et al.,
Respondents

American Telephone and Telegraph Company, etc.,
Intervenor

ITT World Communications, Inc.,
Petitioner

v.

Federal Communications Commission, et al.,
Respondents

American Telephone & Telegraph Company, et al.,
Intervenor

It is hereby ordered that the motion made herein by counsel for the petitioner Western Union International, Inc. by notice of motion dated December 29, 1977 to stay issuance of the mandate; to stay the effectiveness of the Federal Communications Commission decision and order released October 25, 1977 (FCC #20452) and to stay the Federal Communications Commission order of December 13, 1977 pending filing a petition to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN, Chief Judge.

/s/ THOMAS J. MESKILL
THOMAS J. MESKILL, Circuit Judge.

/s/ JOHN R. BARTELS
JOHN R. BARTELS, D.J.

SUPREME COURT OF THE UNITED STATES

No. A-563

WESTERN UNION INTERNATIONAL, INC.
Applicant

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Second Circuit, case Nos. 77-4183, 77-4184 and 77-4191; that the effectiveness of the March 23, 1977 Final Decision and Order and the October 25, 1977 Order on Reconsideration of the Federal Communications Commission, Docket No. 20452, ordering the American Telephone and Telegraph Company to file new tariffs substantially increasing applicant's "Tail Circuit" charges; and that the effectiveness of the December 13, 1977 Federal Communications Commission grant of special permission in Docket No. 20452 authorizing American Telephone and Telegraph Company to implement the new tariffs as of January 1, 1978, be and the same are hereby stayed pending further consideration of the application upon receipt of memoranda of the respondents due 5 PM, Wednesday, January 4, 1978, and pending further order of the undersigned.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States

Clerk of the Supreme Court of the United States

Dated this 30th day of December, 1977.

Deputy

By /s/ FRANCIS J. LORSON

Appendix G, Orders on Motions to Stay.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D. C. 20543

January 9, 1978

Gary J. Greenberg, Esquire
61 Broadway
New York, New York 10006

RE: Western Union International, Inc. v.
Federal Communications Commission, et al.,
A-563

Dear Sir:

The Court today entered the following order in above-entitled case:

The application for stay of mandate of the United States Court of Appeals for the Second Circuit and stay of orders and authorizations of the Federal Communications Commission, presented to Mr. Justice Marshall and by him referred to the Court, is denied. The order heretofore entered by Mr. Justice Marshall on December 30, 1977, is vacated.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By /s/ LAURENCE P. GILL
Deputy Clerk

cc: Hon. Wade H. McCree, Jr.
Hon. Robert E. Bruce
Roderick A. Mette, Esquire
H. Richard Schumacher, Esquire
Grant S. Lewis, Esquire
Gerald Murray, Esquire
Clerk, USCA-2nd Circuit
(Your Nos. 77-4183, 77-4184 & 77-4191)

Appendix H: Relevant Statutes and Rule.

Communications Act of 1934
Subchapter II. Common Carriers, 47 U.S.C.

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided,* That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further,* That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further,* That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from

furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

§ 202. Discriminations and preferences

(a) It shall be unlawful for any common carrier to make any unjust or reasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this chapter include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense.

§ 203. Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall

designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the ssytem of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b)(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in

such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

§ 205 Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the

Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

§ 208. Complaints to Commission; investigations

Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such

common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

§ 209. Orders for payment of money

If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

§ 211. Contracts of carriers; filing with Commission

(a) Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

(b) The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine.

Federal Communications Commission Rules Section 61.38, 47 C.F.R. § 61.38.

§ 61.38 Material to be submitted with letters of transmittal by filing carriers.

(a) *Explanation and data supporting changes and/or new tariff offering.* The material to be submitted for a tariff change or for a tariff filing which is for a service not previously offered, shall include: (1) An explanation of the changed or new matter, the reasons for the filing, and the basis of ratemaking employed; and (2) economic data and information to support the changed or new matter including:

(i) For changed matter, a cost of service study for all elements of costs for the most recent 12-month period; and for changed and new matter a study containing a projection of costs for a 3-year period beginning at the date of the filing of the tariff matter; and

(ii) Estimates of the effects of the changed or new matter upon the carrier's traffic and revenues from the service to which the changed or new matter applies; upon the traffic and revenues from the other service classifications of the carrier; and upon the overall traffic and revenues of the carrier. Estimates should include the estimated effects on the traffic and revenue data for the most recent 12-month period and projections for a 3-year period beginning at the date of the filing of the changed or new matter. Complete explanations of the bases for the estimates should be provided.

(b) *Working papers and statistical data.* (1) There is to be furnished to the Chief, Common Carrier Bureau, upon filing of any tariff change or tariff filing which is for a service not previously offered, two sets of working papers for use by the staff and two sets of working papers which shall be available for use by the public at the Com-

mission's offices. These working papers shall contain the information underlying the data supplied in response to paragraph (a) of this section. A clear indication shall be made as to how the working papers relate to information supplied in response to paragraph (a) of this section.

(2) All statistical studies will be submitted and supported in the form prescribed in § 1.363 of this chapter.

(c) *Submission of explanation and data by connecting carriers.* If the changed or new matter is being filed by the issuing carrier at the request of a connecting carrier, it will be the duty of the connecting carrier to provide the data and information in paragraphs (a) and (b) of this section on the date the tariff matter is filed with the Commission by the issuing carrier.

(d) *Form and content of material submitted with certain rate increases.* (1) For each rate increase in any service or tariffed item resulting in (i) a 10 percent or greater increase in annual revenues from that service or tariffed item, and (ii) at least $100,000 in additional annual revenues, both calculated on the basis of existing quantities of service; or for two or more rate increases applying to the same service or tariffed item during any 12-consecutive-month period resulting in (*a*) a 10 percent or greater increase in annual revenues from that service or tariffed item, and (*b*) at least $100,000 in additional annual revnues, both calculated on the basis of existing quantities of service, the filing carrier shall submit all cost, marketing and other data on which it relies in justification of the rate increase and in an appropriate form to serve as the carrier's direct case in the event the rate increase is set for hearing initially scheduled to commence on a date within 6 months from the date of filing. If the rate increase is designated for hearing the carrier shall submit any additional information on which it relies in

documentary form, within 45 days from the date of designation.

(2) The information and data requirement of subparagraph (1) of this paragraph shall be submitted for a rate increase in any service or tariffed item resulting in more than $1 million in additional annual revenues, as calculated on the basis of existing quantities of service, without regard to the percentage increase in such revenues.

(3) The requirement imposed here is in addition to any requirement imposed by the other provisions of this section.

(e) *Copies of explanation and data to customer.* Concurrently with the filing of any rate for special construction or special assembly equipment and arrangements which was developed on the basis of estimated cost, the filing carrier shall transmit to the customer a copy of the explanation and data required by paragraphs (a) and (b) of this section.

(f) *Exception.* The requirements of this section shall not apply to any carrier with annual gross revenues of less than $100,000.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1318

WESTERN UNION INTERNATIONAL, INC.,

Petitioner,

—against—

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, RCA GLOBAL COMMUNICATIONS, INC., ITT WORLD COMMUNICATIONS INC. and TRT TELECOMMUNICATIONS CORPORATION,

Respondents.

BRIEF OF RESPONDENT RCA GLOBAL COMMUNICATIONS, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 7, 1978

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IN THE

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OCTOBER TERM, 1977

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Respondents.

BRIEF OF RESPONDENT RCA GLOBAL COMMUNICATIONS, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RCA Global Communications, Inc. ("RCA Globcom"), a respondent herein, submits this brief in support of the petition by Western Union International, Inc. ("WUI") for a writ of certiorari to review a judgment and opinion of the United States Court of Appeals for the Second Circuit.

Opinions Below

The decisions below of the Court of Appeals and of the Respondent Federal Communications Commission ("FCC" or "the Commission") are, in our view, accurately described in WUI's petition and are reproduced in the appendices ("App.") to that volume.

The Court of Appeals' opinion of December 21, 1977 (App. 74a-90a), of which review is sought, now has been reported *sub nom. Western Union International, Inc.* v. *FCC,* 568 F.2d 1012 (2d Cir. 1977). The Commission's Reconsideration Order of October 25, 1977 (App. 14a-67a) also has now been published as 60 F.C.C.2d 517 (1977).

Jurisdiction

The judgment of the Court of Appeals was entered on December 21, 1977, and this Court has jurisdiction to review that judgment pursuant to 28 U.S.C. §§ 1254(1) and 2350(a) (1970).

The jurisdiction of the Court of Appeals to review the Orders in suit of the FCC was based on Communications Act § 402(a), 47 U.S.C. 402(a) (1970), and 28 U.S.C. §§ 2341-49 (1970 & Supp. V 1975).

Questions Presented

RCA Globcom endorses, and will not repeat, the two questions posed in WUI's petition. It wishes, however, to emphasize an element subsumed under the second of WUI's questions. It is this:

1. Whether the Commission could properly find, as the first step of its "discrimination" analysis, a "likeness" in the service supplied by AT&T to the international record

carriers and to AT&T's specialized domestic competitors when the Agency focused solely on supposed similarities in the technical attributes of the facilities provided and disregarded large differences in the purposes for which such facilities were used by the two classes of carriers and in the commercial circumstances in which they employed the facilities?

Statutes Involved

The relevant provisions of subchapter II of the Communications Act of 1934, relating to operations of communications common carriers, 47 U.S.C. §§ 201 *et seq.*, are set out in WUI's App. at pages 95a-100a. Of particular salience is Communications Act § 202(a), 47 U.S.C. § 202(a), which provides:

> "(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

Supplementary Statement of the Case

At issue in this case is a Commission finding of, and its prescription of a remedy for, an alleged "unjust or unreasonable discrimination," which Communications Act § 202(a) condemns as "unlawful". The Commission has said that such a discrimination existed, prior to its rulings in suit, in the provision by the American Telephone & Tele-

graph Company ("AT&T") of facilities to, on the one hand, various international record carriers ("IRCs"), including RCA Globcom and WUI, and to, on the other, certain domestic specialized carriers and domestic satellite carriers.

A proper finding of "unlawful" discrimination involves a two-step analysis—*first*, a determination that the services afforded the supplying carrier's two categories of customers are "like" and, *second*, a conclusion that any price differentials between the "like" facilities are unwarranted by differences in cost or other appropriate justification.

WUI's petition provides a compendious description, which we feel no need to repeat, of the proceedings which eventuated in the challenged decisions of the Commission and the Court of Appeals. This presentation shows, *inter alia*, that the Commission's conclusion of "unlawful" discrimination was invalid because it improperly addressed the matter of cost justification for differences in AT&T's facilities prices to the IRCs and to the domestic carriers.

We would add only a few additional comments about the carriers and facilities involved. These support, we submit, our related claim that the first step of the Commission's "discrimination" analysis—its determination of "likeness" —also was improper. We also remark upon the adverse effects, both current and foreseeable, which the Commission's casual "likeness" determination has had and will have upon the international communications services available to the American people.

A. Carriers and Facilities Involved

The country's three principal IRCs, RCA Globcom, WUI and ITT World Communications Inc. ("ITT Worldcom"), and another such carrier, TRT Telecommunications Corporation ("TRT"), appeared below. Each has been in business, directly or through predecessor companies, for over 60 years.* In the early days of telecommunications they supplied, by cable or radio, the country's overseas telegraph services. In current practice they offer, between the continental United States and overseas points, a full range of record services (*e.g.*, telegrams, telex, facsimile, data, television and radio program transmission) and private lines for alternate voice-data ("AVD") use.** (App. 77a)

The IRCs' services, while competitive with each other, have developed, in a complementary fashion, with the overseas services of AT&T, with which they do not, in general, directly compete. AT&T is, not only the principal element of the nation's domestic telecommunications enterprise, but also the country's supplier of overseas telephone service and of private lines to overseas points for voice use.***

In the period of rapid technological advance since the Second World War, the IRCs and AT&T have participated jointly in the planning and financing of, and concurrently use, the principal instrumentalities of overseas communications. These are the submarine cables connecting the

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* *See* the historical data in *Western Union Tel. Co.*, 25 F.C.C. 35, 39-42 (1958), *vacated on other grounds*, 267 F.2d 715 (2d Cir. 1959).

** In 1975, the latest year for which industry-wide statistics are readily available, the IRCs handled 14,340,000 overseas telegrams, 43,600,000 overseas telex calls, and supplied private-line and other advanced record communications services to a broad spectrum of government and business users. *See FCC, Statistics of Communications Common Carriers, Year Ended December 31, 1975*, at 30, 158, 162, 165 (1977).

*** RCA Globcom, WUI, ITT Worldcom, and AT&T participate alternately, a week at a time, but pursuant to a joint tariff, in the provision of the country's overseas television program transmission service. (App. 44a)

United States to Europe, the Far East, points in Central and South America and the Caribbean area, and the American earth stations of the INTELSAT system of international communications satellites.

Directly at issue in this proceeding are the so-called "tail circuits" or "entrance facilities" which constitute essential connections between the IRC operating centers in the limited number of "gateway" cities where the IRCs are permitted to operate (currently New York, Washington, San Francisco, Miami and New Orleans) and the cable landing sites and the satellite earth stations.* This circuitry, though physically located within the country's borders, is an integral part of international communications service and is used exclusively for such service.

Historically, AT&T has leased the "tail circuits" to each of the IRCs, at what AT&T has represented to be its cost, pursuant to contracts which are similar among the IRCs. (App. 7a, 78a) These circuits connect a handful of well-defined points and are derived from trunk facilities which in many cases were specially constructed for this purpose and which also are employed by AT&T for its own international services. Thus, "tail circuits" tie the international carriers' message centers into the jointly used cables and earth stations. They do not extend to the premises of any customer.**

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* The cable landing sites (*e.g.*, Greenhill, Rhode Island and San Luis Obispo, California) and INTELSAT earth stations (at, *e.g.*, Andover, Maine and Brewster Flat, Washington) are remote from the IRCs' few metropolitan "gateways". They were sited in the light of the needs and convenience of the entire international service, AT&T's, as well as the IRCs', and of the contractual availability to the IRCs of "tail circuitry" into the "gateways". The IRCs have no realistic alternative to the "tail circuitry" supplied by AT&T.

** By reason of the IRC's limitation to the five "gateway" cities "through" record services between domestic and overseas locations conventionally are provided to customers by interconnection, at an IRC's message center, of the latter's overseas circuitry and the facilities of a domestic carrier, usually AT&T or a Bell System affiliate, needed to complete the connection to the domestic customer's premises. Facilities "inland" of an IRC's message center required to reach particular customers are taken pursuant to the applicable tariff of the domestic carrier concerned, and they are not in issue here.

The Commission's determination of "discrimination", which the IRCs challenge, involves a "comparison" of the aforesaid facilities supplied by AT&T to the IRCs and the facilities which, in recent years, AT&T has made available to a new category of specialized domestic carriers and domestic satellite carriers. The Commission authorized the first such carrier in 1969 (to operate between Chicago and St. Louis), *see Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969). Thus its license post-dates the most recent of the series of contracts by which AT&T, over decades, had supplied the IRCs.

The new domestic carriers are direct competitors of AT&T, whose entry and expansion AT&T has vigorously resisted.* Such carriers primarily offer private-line channels to large-volume communicators in competition with the domestic private-line services of AT&T.** They normally own and operate either domestic satellites (instruments distinct from those employed in the INTELSAT system used by AT&T and the IRCs for their overseas service) or microwave trunks which link operating centers in major cities in various parts of the country. Unlike the IRCs, they are able to locate their earth stations and other facilities at sites of their own choosing. The domestic carriers'

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* *See, e.g., Bell System Tariff Offerings*, 46 F.C.C.2d 413, 435 *enforced sub nom. Bell Tel. Co.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

** *See MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977).

ownership of their own long-distance facilities is a principal condition of their claimed capacity to offer private-line services differently from, or more cheaply than, AT&T.

The Commission made no record below of what facilities the domestic carriers actually seek and obtain from AT&T (and its affiliated Bell System operating companies). While AT&T, pursuant to prior Commission order, tariffs a broad range of facilities which it will make available to domestic carriers,* the reported cases indicate that the latter largely seek (and get) from the telephone carriers, not the full menu, but local loops and other short-haul facilities required to link their own trunks and message centers with the premises of individual subscribers to their private-line services.**

AT&T's present rates to the domestic carriers are the product of a Settlement Agreement which AT&T and several of the domestic carriers negotiated in 1975, and which the FCC accepted, to conclude a Commission rate investigation known as Docket No. 20099. *See American Tel. & Tel. Co.*, 52 F.C.C.2d 727 (1975). The agreement which AT&T and the domestic carriers reached to end that dispute explicitly noted that AT&T would continue, thereafter, to supply tail circuits to the IRCs pursuant to contract at rates different from (and lower than) those in the agreed domestic tariffs. (*Id.* at 735)

The Commission's finding that the facilities which AT&T afforded the IRCs and the domestic carriers were "like" is based, in its initial Decision and Order of March 23, 1977, 63 F.C.C.2d 761 (1977) (App. 5a-13a), on little more than the assertion that they are "the same kind of facilities" (63 F.C.C.2d at 762) (App. 6a). In its further Order

* *See Bell System Tariff Offerings, supra,* 46 F.C.C.2d at 438.

** *See California* v. *FCC,* 567 F.2d 84 (D.C. Cir. 1977), *cert. denied,* 98 S.Ct. 721 (1978).

on reconsideration, released on October 25, 1977 (App. 14a-67a), the Commission elaborated to note that:

> "[I]t was evident from a reading of [AT&T's domestic facility] tariffs and [the tail circuit] contracts that the contract facilities ("voice-grade circuits'[*] in the terms of the contract) served the same communications function for the IRCs as the tariff facilities ('voice grade facilities' in the tariff language) did for the DSCCs and SCCs [domestic satellite and specialized common carriers] . . . . Despite this functional similarity the contracts provided preferential rate treatment to the IRCs. . . ." (App. 16a) (citations omitted)

With this it viewed its burden of showing "likeness" as met. Everything else could be disregarded.

B. The Harsh Effects on the Overseas Service

AT&T (and its Bell System affiliates) complied with the Commission's initial Decision in this Docket by cancelling their long-standing contractual arrangements with the IRCs and by issuing, with respect to them, tariffs virtually identical to those covering the telephone carriers' provisions of facilities to their domestic competitors. (App. 22a).**

* The term "voice-grade circuit" refers to the bandwidth of about 3-4 kilohertz normally employed in the transmission of a voice conversation. Such bandwidths can be, and conventionally are, broken down into "telegraph grade" channels for many record uses. They also can be aggregated into larger packages for other communication uses.

** Under the Commission rulings in suit, the agreed arrangement between the domestic carriers and AT&T in Docket 20099 serves as the model for the tariff which AT&T (and its Bell system affiliates) now have imposed on the IRCs. The tariffs to which AT&T and the domestics agreed in Docket 20099 were, in turn,

This has had an immediate, and harsh, effect on the costs to be borne by the IRCs and, ultimately, their customers. AT&T's new tariffs expose each of the IRCs to overall rate increases of more than 100%, aggregating for the four carriers as a group some $5,000,000 per year.* This increase, unrequested by AT&T or anyone else, but effectively mandated by the Commission, will not be offset by any rate decrease to anyone.

The adverse effects of the Commission's decision extend, however, far beyond their immediate pocket-book impact, substantial as that is in terms of the IRC's overall operations. The Commission, in making its comparative appraisal of the facilities which AT&T affords the IRCs and the telephone carriers' domestic competitors searched for and was satisfied, it seems, by any common denominator. In finding "likeness" it focused *entirely* on narrow technical parameters ("voice-grade circuits" and their "functional" use to carry communications) which can be applied to almost any circuitry. It disregarded vast differences in the commercial circumstances of the two categories of carriers which lease circuitry from AT&T and in their needs and purposes in doing so.

Thus, the Agency's decision impels AT&T to a presumption that the two classes of carrier customers should

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patterned on the tariffs of AT&T (and its Bell system affiliates) applicable to their own private-line customers, except that the domestic carriers' tariffs provide a substantial (30%) discount for short-haul circuits (App. 46a-47a, 61a-62a). The Commission has insisted on applying to the IRCs, the domestic carriers' model even though the negotiations in Docket 20099, by excluding the IRCs, had excluded from the bargaining, the carriers primarily interested in the long-haul rates which affect the IRCs.

* This amount, for only a small, albeit integral and vital, portion of the facilities employed by the four IRC's compares to their total system revenues in 1975 of approximately $273,000,000. *See FCC, Statistics of Communications Common Carriers, Year Ended December 31, 1975,* at 30, 158, 162, 165 (1977).

be treated identically in almost all circumstances. The Commission does so even though specialized domestic carriers are AT&T's competitors, which AT&T has no incentive to encourage, while, in the overseas arena, AT&T and the IRCs provide to the public complementary services which have benefitted, and would continue to benefit, from the joint and flexible use of the necessarily limited, and expensive, facilities needed for intercontinental transmission.

The consequences of this Commission-imposed policy of "equivalence" are evident from an examination of the "tail circuit" tariffs filed by AT&T in response to the Commission Orders in suit. They deprive the IRCs of service options, valuable to users of the overseas service, which they enjoyed under the prior contractual mode, but which AT&T appears unwilling to offer its domestic rivals and thus will no longer supply the IRCs. For example:

(1) Under the tariffs which AT&T applies to the domestic carriers and the "conforming" tariffs which it has been required to apply to the IRCs, there is, for any circuit, a minimum charge of at least a month's rentals; under the IRCs' contracts with AT&T, circuits could be taken for a minimum charge of 1/10 of a month's rental in accordance with normal international practices throughout the world. The short-term rentals are important to the news media for covering international news and sporting events—for example, President Carter's recent trip to South America and Africa. (App. 55a, 61a)

(2) The IRCs no longer have access, under the new tariffs covering their "tail circuitry", to "groups" and "supergroups"—bundles of circuits that can be aggregated for simultaneous, coordinated use. Such aggregation is vital if the IRCs are to meet the growing need for high-

speed, high-volume data transmission between computers and data banks on different continents. (App. 49a, 54a, 60a)

(3) Quality control procedures and guarantees, which the IRCs received with their circuits under the contracts, are not similarly available under the replacement tariffs, thus requiring other arrangements if the transmission standards appropriate to intercontinental communications are to be retained. It is not clear that alternative arrangements can feasibly be obtained. (App. 38a-39a, 60a)

The problems posed by the Commission's imposition of patterns developed in the domestic arena upon the quite different circumstances of international communications do not end there. Already, AT&T and RCA Globcom are at odds before the Commission over the telephone carrier's efforts to impose "domestic" conditions on facilities which it supplies to the IRCs in New York and San Francisco in order that the latter may implement their role in the overseas carriers' joint provision of television transmission service. At every turn the IRCs' access to facilities available from AT&T will be measured, not by the needs and uses of the complementary overseas voice and record services, but by the imperatives of the telephone carrier's competitive posture *vis a vis* domestic carriers.

Reasons For Granting The Writ

WUI's petition sets forth several persuasive reasons for granting the writ of certiorari which its petition seeks. The preceding discussion of the "likeness" component of the Commission's "discrimination" finding establishes, we submit, another.

In reaching its conclusion that the facilities which AT&T afforded the IRCs and the domestic carriers were "like"

the Agency relied on only two things—the fact that the IRCs' contracts and the domestic tariffs refer to the transmission paths they cover in terms of a unit of bandwidth known as the "voice grade circuit" and the claim, not further explained, that the circuitry afforded the two groups of carriers are "functionally equivalent". Given the inadequacy of the record which the Commission permitted the parties to make, the Commission had no more.

Whether an Agency, in making a finding of "unlawful discrimination" can proceed on so little—whether it can disregard, not only the differences in costs related in WUI's submission, but also the different purposes for which the two groups of carriers use their circuits, the different kinds of traffic they carry, the differences in density and length of their route patterns, the dissimilarity in the nature of the businesses of the domestic carriers and the IRCs, the distinct manners and circumstances in which the circuits serving the two carriers were engineered and constructed, and other points of difference between the domestic carriers and the IRCs—raises a profound issue for all of the country's regulated industries which, like common carrier communications, are subject to statutory nondiscrimination requirements and to tariff regimes.

The Commission's ruling, which the Court of Appeals has endorsed, is unwarranted by the one reported judicial decision construing the Communications Act in this context, *see American Trucking Ass'ns* v. *FCC*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967), *affirming American Tel. & Tel. Co.*, 38 F.C.C. 370, 377-78 (1964), and 37 F.C.C. 1111, 1113 (1964), and by extensive practice under the Interstate Commerce Act, upon which the Communications Act is patterned, *see Atchison, T. & S.F. Ry.* v. *Witchita Board of Trade*, 412 U.S. 800, 812-13 (1973),

L.T. Barringer & Co. v. *United States,* 319 U.S. 1, 6, 9 (1943), *United States* v. *Illinois Cent. R.R.,* 263 U.S. 515, 524 (1924); *Texas & P. Ry.* v. *ICC,* 162 U.S. 197, 219-20 (1896).

These cases recognize that a valid finding of unlawful discrimination depends, not upon the mechanical application of a simplistic formula, but upon a detailed appraisal of a wide range of relevant facts. As this Court wrote in *Texas & P. Ry.* v. *ICC, supra:*

> "The very terms of the statute, that charges must be *reasonable,* that discrimination must not be *unjust,* and that preference or advantage to any particular person, firm, corporation or locality must not be *undue* or *unreasonable,* necessarily imply that strict uniformity is not to be enforced, but that *all circumstances and conditions* which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, *should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.*" (162 U.S. at 219) (emphasis supplied in part)

Only such an approach can reconcile, in a socially useful way, the statutory directive that a regulated carrier not unjustly discriminate and the entrepreneurial imperative which has its role to play even in a regulated industry. A carrier should have the opportunity to apply a reasonable discretion in shaping its response to the almost infinite variety of a vast, vital and free economy.

The simplistic tests of "likeness" and "discrimination" which the Commission has promulgated in this case should not become the law of the Communications Act and, by potential extension, of the analogous statutes regulating other important industries. Certainly it should not become

the law without review and consideration by this Court.

This is not a situation in which the nation can afford the luxury of time and many lower-level cases to "work out" a "correct" solution. The communications industry is living, today, through a period of extraordinarily rapid technological advance. Current decisions will fix industry structure for years, even decades, to come. Are these decisions to be made, as the Communicaitons Act seems to require, by an Agency thinking carefully about the vast powers it exercises? Or are they to be made by officials free to substitute *a priori* conclusions for the hard work of factual analysis and judgment? The guidance of this Court is needed.

Conclusion

The writ of certiorari requested should issue.

Respectfully submitted,

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April 7, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1318

WESTERN UNION INTERNATIONAL, INC.,
Petitioner,

against

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, AMERICAN TELEPHONE & TELEGRAPH COMPANY, RCA GLOBAL COMMUNICATIONS, INC., ITT WORLD COMMUNICATIONS INC., and TRT TELECOMMUNICATIONS CORPORATION,
Respondents.

BRIEF OF RESPONDENT ITT WORLD COMMUNICATIONS INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF RESPONDENT ITT WORLD COMMUNICATIONS INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Respondent ITT World Communications Inc. ("ITT Worldcom") submits this memorandum in support of the Petition for a Writ of Certiorari which has been submitted to the Court by Petitioner, Western Union International, Inc. ("WUI").

WUI petitions the Court to review a decision of the United States Court of Appeals for the Second Circuit, which affirmed a number of orders entered by the Federal Communications Commission ("FCC").[1] In these Orders, the FCC purported to find that certain contracts between

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1. The Court of Appeals decision is reproduced as Appendix F to WUI's Petition, and the FCC Orders at issue are reproduced as Appendices B, C, D, and E.

the international record carriers ("IRCs")[2] and respondent American Telephone & Telegraph Company ("AT&T") specified rates and charges which were unreasonably discriminatory, and which were therefore unlawful under Section 202(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 202(a). On the basis of this finding, the FCC required AT&T to increase substantially its charges to IRCs, so that the amounts paid by the IRCs would equal the rates that AT&T charged its domestic competitors for communication services which the FCC deemed to be "like" the services AT&T provided the IRCs.

While ITT Worldcom does not wish to burden the Court with repetitive argument, it respectfully requests that a writ of *certiorari* be granted for the reasons set forth in WUI's Petition. The FCC's decisions, if permitted to remain in effect, will increase the operating costs of the IRCs by millions of dollars annually. The prospect of so serious an economic impact on an industry of international importance makes this case sufficiently important to merit this Court's consideration.

Moreover, the FCC's decisions raise significant issues of federal administrative and regulatory law, which this Court *should* address. As WUI's Petition makes clear, the FCC's determination that the IRCs were being charged unreasonably discriminatory rates by AT&T is based on nothing more than the functional similarity of the communications services which AT&T was providing the IRCs and the domestic carriers. The FCC concededly had no knowledge of AT&T's costs of serving the two groups of carriers; nor did it make any investigation of the impact of the alleged discrimination on the public or the domestic

2. The IRCs include ITT Worldcom, WUI, and respondents RCA Global Communications, Inc. and TRT Telecommunications Corp.

carriers (which do not compete with the IRCs and which have never complained of the "preference" the IRCs were allegedly enjoying). This Court's prior decisions establish that, in these circumstances, the FCC has not made the findings necessary to establish that the rates specified in the AT&T-IRC contracts were unreasonably discriminatory.[3]

Assuming that the FCC had properly found that the rates being charged the IRCs were discriminatory, this case also presents the question of whether the FCC made the appropriate findings before requiring AT&T to increase its rates to the IRCs. Section 205(a) of the Communications Act, 47 U.S.C. § 205(a), expressly requires the FCC to find that new rates are "just and reasonable" before it prescribes their applicability. Here, the FCC did not purport to make a finding that the rates being charged the domestic carriers would be "just and reasonable" if applied to the IRCs. Nor could it have done so on the record before it, because it had not obtained the necessary cost data from AT&T to permit it to determine whether the rates charged the domestic carriers were reasonably related to AT&T's costs.

Instead of attempting to make the statutorily-mandated finding, the FCC forced AT&T to increase the IRCs' rate "voluntarily." WUI's Petition fully demonstrates that the FCC, while ostensibly permitting AT&T to decide the manner in which "discrimination" would be eliminated, in

3. In addition to the cases cited by WUI in its Petition, *see, F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). These two cases hold that an administrative agency may interfere with inter-carrier contracts only if the agency has first found that abrogation or modification of the contracts is necessary to protect the public interest. As the Second Circuit recognized, no such finding was made here. See p. 89a of the Petition.

actuality left AT&T no option except to raise the IRCs' rates to the higher levels then being charged the domestic carriers. The question of whether the FCC may thus evade the regulatory scheme of the Communications Act, by inducing a carrier into "voluntarily" filing the rates which the agency wishes to prescribe, is a second issue presented by this case which is worthy of this Court's consideration.

Conclusion

For the reasons stated above, respondent ITT World Communications Inc. respectfully requests that the Petition for a Writ of *Certiorari* be granted.

Respectfully submitted,

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No. 77-1318

In the Supreme Court of the United States

OCTOBER TERM, 1977

WESTERN UNION INTERNATIONAL, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 74a-90a) is reported at 568 F. 2d 1012. The Designation of Investigation by the Federal Communications Commission (Pet. App. 3a-4a) is reported at 52 F.C.C. 2d 1014; the Commission's Final Decision and Order (Pet. App. 5a-13a) is reported at 63 F.C.C. 2d 761; and the Commission's Reconsideration and Action on Petitions to Reject and Suspend (Pet. App. 14a-70a) is reported at 66 F.C.C. 2d 517.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1977. The petition for a writ of certiorari was filed on March 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2350(a).

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the finding of the Federal Communications Commission that differential rates charged by the American Telephone and Telegraph Company (AT&T) to certain international and domestic carriers were discriminatory rates for like services.

2. Whether the Commission's directive to AT&T to eliminate certain unlike charges for like services constituted a prescription of rates that could properly be made only after a full inquiry into the costs of service.

STATEMENT

1. International record carriers (IRCs)[1] transmit and receive overseas telecommunications by satellite and by submarine cable. Their international communications are funneled through five "gateway" cities in this country. In order to complete their international communications networks, the IRCs lease from AT&T both "intercity facilities" (lines that connect the gateway cities to each other) and "entrance facilities" (lines that join the operating centers to submarine cable heads and satellite earth stations). In the past, the rates charged to the IRCs for these connections were set by contract, rather than by tariff (Pet. App. 76a-80a).

Certain domestic specialized carriers[2] lease from AT&T the same type of intercity and entrance facilities that are

[1]The largest IRCs are RCA Global Communications, Inc.; ITT World Communications, Inc.; petitioner Western Union International, Inc.; and TRT Telecommunications Corp. IRCs are licensed by the Commission to provide various communication services between the United States and overseas points (Pet. App. 77a).

[2]The domestic specialized carriers include terrestrial carriers, such as MCI Telecommunications Corp., and domestic satellite carriers such as RCA American Communications, Inc. They were licensed in the early 1970s to offer private line services to certain large customers. Although the Commission has regarded the specialized carriers as limited to providing private line services, one court has construed their authority more broadly. *MCI Telecommunications Corp.* v. *Federal Communications Commission*, 561 F. 2d 365 (C.A. D.C.), certiorari denied, January 16, 1978 (No. 77-436).

used by the IRCs. These domestic carriers compete with AT&T in providing service to governmental and large commercial users. In 1974, after investigating complaints that AT&T was restricting the domestic carriers' access to certain circuits and that it was charging them discriminatory rates, the Commission ordered AT&T to provide the domestic carriers with access to those circuits at standardized rates. *Bell System Tariff Offerings*, 46 F.C.C. 2d 413, affirmed *sub nom. Bell Telephone Co. of Pennsylvania* v. *Federal Communications Commission*, 503 F. 2d 1250 (C.A. 3), certiorari denied, 422 U.S. 1026. See Pet. App. 78a-79a.

Following this order, AT&T and the domestic carriers entered into negotiations over the terms and conditions under which AT&T would offer the circuits in question. A Settlement Agreement reached at the conclusion of these negotiations established tariffs applicable to the AT&T circuits used by the domestic carriers, but the tariffs did not set rates for use of the facilities leased by the IRCs. The rates charged to the IRCs under contracts were lower than the rates set in the tariffs for domestic carriers (Pet. App. 79a).

2. In May 1975, at the same time as it accepted the Settlement Agreement, the Commission instituted a restricted rulemaking proceeding to determine whether AT&T should be permitted to continue leasing facilities to the IRCs under terms more advantageous than those offered to the domestic carriers (Pet. App. 3a-4a). The Commission stated that it appeared that there was "no

significant difference between the interconnection facilities provided to the IRCs and those provided under tariff to the specialized common carriers including domestic satellite common carriers" (Pet. App. 3a).

The IRCs then filed comments with the Commission, arguing that the differential rates were justified because of differences in the nature of the two communications networks. The facilities leased by the domestic carriers were distinguishable from the facilities leased by the IRCs, they argued, because the latter were part of an international network (Pet. App. 81a). The IRCs did not point, however, to any particular differences in physical facilities, functions, or costs of the two systems that might have justified the differential rate structure (*ibid.*).

The Commission found, after considering all of the parties' submissions, that the service provided to the IRCs is "essentially identical" to that provided to the domestic carriers and that no justification had been shown for charging different rates to the two groups (Pet. App. 9a). The Commission expressed concern that, as a result of the difference in the rate structures for the two systems, domestic customers might well be subsidizing international customers (*ibid.*). In addition, the Commission noted that as a result of the disparity, AT&T was able to charge higher rates to the domestic carriers, with which it directly competes, than to the IRCs, with which it does not compete (*ibid.*). Noting that neither AT&T nor the IRCs had made a sufficient showing to rebut the *prima facie* case of discrimination, the Commission concluded that the differential rates were discriminatory, in violation of Section 202(a) of the Communications Act, 48 Stat. 1070, as amended, 47 U.S.C. 202(a) (*ibid.*).

Accordingly, the Commission ordered AT&T to stop charging discriminatory rates to the two groups. The Commission did not order AT&T to institute any

particular rate for any service, and it expressed no opinion about how AT&T should eliminate the discrimination (Pet. App. 11a). The Commission provided, however, that if AT&T should offer its facilities to all carriers—domestic and international—on identical terms, it would not require the company to provide cost justification for the new rate "until such time as AT&T files full justification for the various [domestic carrier] facility offerings" (Pet. App. 11a n. 8).[3]

Following this order, AT&T requested and was granted four meetings with Commission staff personnel to discuss difficulties it was having in applying the Commission's order to a few highly unusual communications systems. These included the Washington-to-Moscow "Hotline," a Florida-Cuba cable circuit serving foreign diplomats in Havana, the Department of Defense's AUTOVON network, and a facility used by the National Aeronautics and Space Administration to track and monitor satellites (Pet. App. 82a). None of the discussions with the staff concerned the Commission's underlying decision; they dealt only with implementation (*id.* at 87a-88a).[4]

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[3]This ruling was in effect an offer to waive the application of Section 61.38 of the Commission's rules, 47 C.F.R. 61.38, which requires that all rates be justified by underlying costs. A similar waiver had been granted to implement the Settlement Agreement, because AT&T had indicated that the cost justification materials would take some time to prepare. AT&T stated that it expected to have the cost justification information completed by December 1978 (Pet. App. 82a).

[4]These special systems were later discussed in the Commission's order on reconsideration. The Commission there held that the special systems were not governed by the original order, because that order concerned only systems subject to the general leasing contracts between AT&T and the IRCs. These unusual systems were provided for under special contractual arrangements and thus were outside the reach of the Commission's restricted rulemaking proceeding (Pet. App. 45a).

AT&T subsequently filed tariffs for the IRC interconnection circuits, choosing to eliminate the discrimination by raising the rates charged the IRCs to the level of those charged the domestic carriers. With respect to the issue of cost differences between the IRC and domestic facilities, AT&T represented that the facilities provided to the IRCs " 'are physically and essentially the same as those provided to domestic[s]. We cannot justify a lower charge to the IRC's' " (Pet. App. 83a). The IRCs then filed petitions for reconsideration of the Commission's order and for rejection or suspension of the new tariffs.

3. On October 25, 1977, the Commission denied both sets of petitions (Pet. App. 14a-67a). Based on the entire record before it,[5] the Commission again found that no party had demonstrated the existence of sufficient differences between the services furnished by AT&T to the domestic and international carriers to justify their classification as unlike services (Pet. App. 37a). The Commission again observed that the similarity of the services was apparent on the face of the applicable tarriff and contract provisions. Both employed "voice-grade" circuits with similar bandwidths, and both performed essentially the same functions (Pet. App. 16a).

The Commission observed that AT&T had admitted that the facilities provided to the IRCs were physically and functionally the same as those provided to the domestic carriers (Pet. App. 32a n. 13). Concluding that

[5]The Commission considered the original decision in the case and the accompanying record, the IRCs' petitions for reconsideration, the IRCs' petitions opposing AT&T's proposed tariffs, all other miscellaneous letters and comments filed by the IRCs, AT&T's responses to the IRCs' petitions to reject, the summary of the meetings between AT&T and the Commission staff, and the summary of a public meeting held with all the parties on September 7, 1977 (Pet. App. 66a).

no cost-based justification had been offered—and no other justification had been shown—for charging different rates, the Commission reaffirmed its ruling that the disparity violated Section 202(a) of the Communications Act.

4. The court of appeals affirmed the Commission's order. The court concluded that the Commission's finding that the domestic and IRC facilities are "like" services is supported by substantial evidence. It remarked that, although the IRCs had been given ample opportunity to explore the allegedly unique characteristics of the IRC interconnection circuits, "no significant differences between the two systems came to light" (Pet. App. 86a).

The court also noted that the Commission's order required only that the domestic and IRC rates be "equalized—by whatever means," and that AT&T could achieve this end in ways other than by raising the IRC rates. Thus, "[i]t was * * * open to AT&T to alter the rates it was charging the domestics by bringing them down to the fee levels charged in the IRC contracts" (Pet. App. 89a). Under these circumstances, the court concluded, the Commission could not be accused either of improperly abrogating the contracts between AT&T and the IRCs or of prescribing rates (*ibid.*).[6]

[6]The court also rejected the contention that the four meetings between AT&T and the staff had violated the Commission's rules prohibiting *ex parte* presentations, *i.e.*, "communication[s] going to the merits or outcome of any aspect of a restricted proceeding." 47 C.F.R. 1.1201(f). The court found that "[n]othing said in these meetings was intended to affect the order itself in any manner, or to influence the Commission regarding the petition for reconsideration" (Pet. App. 88a). The court concluded, in addition, that the IRCs were not prejudiced by any of the matters discussed in those meetings (*ibid.*). Although petitioner takes issue with this aspect of the court's decision (Pet. 19), it does not include any matter concerning the *ex parte* communications in the questions presented (Pet. 3). We therefore do not discuss the matter further. There is, in any event, no need to add to the court of appeals' discussion of the point.

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals, and it does not warrant further review.

1. The Communications Act makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges * * * for or in connection with like communication service." 47 U.S.C. 202(a). This prohibition "is flat and unqualified. * * * Equal prices for like services is in itself a matter of public interest." *American Trucking Associations, Inc.* v. *Federal Communications Commission*, 377 F. 2d 121, 130 (C.A.D.C.), certiorari denied, 386 U.S. 943.

Services are "like" within the meaning of Section 202(a) if they are functionally equivalent.[7] The Commission properly concluded, on the basis of the ample evidence before it, that the services provided to the IRCs and to the domestic carriers are functionally equivalent. For five months it had monitored the carrier negotiations that resulted in the Settlement Agreements, in the course of which AT&T produced detailed descriptions of the relevant facilities. As was evident from the contracts and

[7]See *American Trucking Associations, Inc.* v. *Federal Communications Commission, supra*, 377 F. 2d at 127; *American Telephone and Telegraph Co. (Hi-Lo)*, 58 F.C.C. 2d 362, 363 (opinion on reconsideration), affirmed *sub nom. Commodity News Services, Inc.* v. *Federal Communications Commission*, 561 F. 2d 1021 (C.A.D.C.). Services using completely different technologies may be "like" services if they do not differ in any material functional respect. For example, "international services using satellites and cables; domestic message telecommunications service calls by satellite or terrestrial; domestic communications suing coaxial cable, microwave radio, or other facilities are not offered as 'unlike' services at different rates." *Investigation into the Lawfulness of Tariff FCC No. 267, Offering a Dataphone Digital Service Between Five Cities*, 62 F.C.C. 2d 774, 796-797.

tariffs, the facilities for both the IRCs and the domestic carriers carry signals between the domestic network of AT&T and the specialized long-distance circuits of the other carriers. They employ similar circuits with similar bandwidths (Pet. App. 16a). Criteria of reliability appear to be similar. The Commission stated that "the entrance facilities in both cases permitted interconnection of either earth stations, microwave terminals, or cable heads to operating offices, and the intercity facilities in both cases permitted interconnections between and among operating offices in different cities" (*ibid.*). Moreover, AT&T confirmed that the facilities it was providing to the IRCs are essentially the same as those provided to the domestic carriers and that it could not show any cost justification for a lower charge to the IRCs (Pet. App. 32a).

The IRCs did not seriously dispute in the court of appeals the Commission's conclusion that the facilities are functionally similar (Pet. App. 86a), and they do not do so here. Instead, they argued that they have unique needs and that the facilities provided to them are unique because they are part of an international system. Both the Commission (Pet. App. 9a) and the court (Pet. App. 86a) found this argument unpersuasive. In so contending, they show only that the electronic signals are going to different destinations, but not that the facilities over which the signals travel are different in any way. The court therefore properly upheld the Commission's determination that the facilities were "like."

Petitioner contends, however, that the Commission was not entitled to order the elimination of different rates for "like" services until it had proved that no cost differences could account for the difference in rates (Pet. 10-13, 20-24). Because no cost data were before the Commission, petitioner maintains, the Commission could not conclude that the differential rates were "unjust or unreasonable"

and therefore could not upset the prevailing carrier-made rates. This argument fails because the Commission has no obligation to prove that a rate disparity for like services is unjustified; rather it is the carrier's obligation to justify a rate disparity. See *Trailways of New England, Inc.* v. *Civil Aeronautics Board*, 412 F. 2d 926, 932 n. 13 (C.A. 1); *American Trucking Associations, Inc.* v. *Federal Communications Commission, supra*, 377 F. 2d at 133. Proof that unlike rates are being charged for like services is a *prima facie* case of discrimination. And if, as happened in this case, the carrier does not provide a justification for the rate differential, the burden of establishing a justification falls to the party seeking the benefit of the differential rate. See *Copley Press, Inc.* v. *Federal Communications Commission*, 444 F. 2d 984, 988-989 (C.A.D.C.).

The IRCs did not satisfy this burden, for they offered no evidence at all. They rested entirely in the court of appeals on speculation that cost differences *might* justify the disparity and on the observation that AT&T had not completed preparing its final cost data. Because the IRCs did not argue before the Commission that the rate differential was cost-justified (Pet. App. 32a n. 13), the court properly declined to consider that issue for the first time on appeal (Pet. App. 87a).[8] See 47 U.S.C. 405. In any event, the Commission's action was appropriate in light of the fact that the only evidence on the subject of cost justification was the statement by AT&T suggesting that none existed (Pet. App. 87a).

[8]Petitioner asserts (Pet. 12) that the court of appeals' statement is incorrect. But although in their petitions to reject or suspend the tarriffs, the IRCs alluded to possible cost differences, they did so only to buttress their argument that before the rates could become effective AT&T should be required to file cost data pursuant to Section 61.38 of the Commission's rules, 47 C.F.R. 61.38. The Commission's response, to which petitioner refers, dealt with this matter thoroughly. But, as the court noted, the question of tariff legality is quite distinct from the question of discrimination (Pet. App. 87a n. 15), and the fact remains that the IRCs offered no cost justifications before the Commission.

2. Petitioner also contends (Pet. 16-20) that the Commission prescribed a rate[9] without going through the proper statutory procedure for rate prescription. 47 U.S.C. 205(a). This argument, however, is based on the incorrect premise that the only way AT&T could comply with the Commission's order was to raise the IRC rates to the level of the domestic rates, and that the Commission therefore indirectly prescribed that rate for the service to the IRCs.

Contrary to petitioner's contention, the Commission did not coerce AT&T into filing a particular tariff.[10] The Commission simply ordered AT&T to eliminate the disparate treatment of domestic carriers and the IRCs. AT&T could do so either by filing a new tariff or by some other means (Pet. App. 11a n. 8). As the court of appeals explained, "[i]t was thus open to AT&T to alter the rates it was charging the domestics by bringing them down to the fee levels charged in the IRC contracts" (Pet. App. 89a). In addition, there was nothing to prohibit AT&T from choosing an entirely new rate, so long as it either treated both sets of carriers equally, or to provide a

[9]A prescribed rate is a rate fixed by the agency from which the carrier cannot deviate without prior agency permission. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 386-387, *American Telephone and Telegraph Co.* v. *Federal Communications Commission*, 487 F. 2d 864, 874 (C.A. 2).

[10]This case has nothing in common with *Mobil Alaska Pipeline Co.* v. *United States*, No. 77-452, argued March 28, 1978, to which petitioner refers (Pet. 15, 16, 19). *Mobil Alaska* involves the questions whether the Interstate Commerce Act authorizes the suspension of an initial rate for a new service and whether, if so, the Commission may announce in advance that it will not suspend rates lower than a certain level. There are no new rates for new services here, and the Commission did not announce in advance that AT&T should file one rate rather than another. There is therefore no reason to hold this case pending the disposition of *Mobil Alaska*.

cost justification for any disparity (Pet. App. 11a and n. 8).[11] Because AT&T had the discretion to file any rate it desired,[12] the Commission's action cannot be construed as a rate prescription. *Texas & Pacific Ry. Co.* v. *United States,* 289 U.S. 627; *National Association of Motor Bus Owners* v. *Federal Communications Commission,* 460 F. 2d 561, 565 (C.A. 2).[13]

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[11]The court observed that the Commission has instituted a hearing into the legitimacy of all the tariff rates for facilities provided by AT&T to both the domestic and the international carriers. Thus, the IRCs are in no danger of sustaining irreparable injury by paying the same rates as domestic carriers. If the hearing ultimately should reveal that those rates result in unduly high charges to the IRCs, they "would be able to recover over-charges plus interest. 47 U.S.C. §§ 208-09" (Pet. App. 87a).

This proceeding offers petitioner and the other IRCs a full opportunity to present to the Commission any available arguments about cost. It effectively reduces the order upheld by the court of appeals to no more than a stopgap pending the outcome of the cost investigation.

[12]Petitioner contends that the existence of the Settlement Agreement deprived AT&T of all options other than to increase the IRCs' rates to those established in that Agreement (Pet. 10, 18). But nothing in the Agreement bars a *reduction* in rates to domestic carriers, either to the low rates enjoyed by the IRCs or to any intermediate rate. The domestic carriers would hardly have objected to a decrease in their rates. And if the Settlement Agreement barred any rate *higher* than those fixed, then the IRCs are in no position to complain, for that interpretation would set a cap on the IRCs' rates. But however that may be, when the Commission ordered AT&T to eliminate the existing discrimination, explicitly refusing to express any opinion as to what "level of tariff charges, etc., AT&T should file to remove its inequitable treatment of carriers" (Pet. App. 11a), it superseded for the purposes of this case any limitations the Settlement Agreement or the Order accepting (but not approving) that Agreement (52 F.C.C. 2d 727, 732) may have put on AT&T's freedom to revise its rates.

[13] As the court of appeals stated (Pet. App. 89a), the IRCs took the position with AT&T that the Commission's order had not prescribed any one rate but left AT&T discretion to take action other than raising the IRCs rates. Petitioner now takes the opposite view (Pet. 17).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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